Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

DEPUTY PAUL THRASH,

Petitioner/Appellee,

v.

HERBERT GULLIFORD,

Respondent/Appellant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Ninth Circuit -- unlike other circuits -- require a police officer to cross appeal before he can assert qualified immunity as an alternative ground for affirming his defense verdict in a 42 USC §1983 claim?

2. In determining when First Amendment rights are "clearly established" for qualified immunity purposes, should federal courts give full faith and credit to precedent of the officer's home state that upholds similar arrests against similar constitutional challenges?

3. May the Ninth Circuit, under the guise of the "law of the case" and by preempting a jury's fact finding role, direct liability against a police officer because the arrestee accompanied his unlawful act with First Amendment speech?

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I. REPORTS OF OPINIONS

The Ninth Circuit's first opinion in this case is published at Gulliford v. Pierce County, 136 F.3d 1345 (9th Cir. 1998). The Ninth Circuit's second opinion is unofficially published at Gulliford v. Thrash, 2001 WL 427285 (9th Cir. Apr. 25, 2001).

II. JURISDICTION

The first opinion in this case by a divided Ninth Circuit Court of Appeals was entered on February 27, 1998, see App. A, and rehearing was denied in another split decision on April 9, 1998. See App. B. After retrial the second opinion of another divided Ninth Circuit Court of Appeals was entered on April 25, 2001, see App. C, and rehearing was denied in another split decision on June 14, 2001. See App. D. This Court has jurisdiction under 28 USC §1254 (1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS (APPENDIX W)

A. U.S. Constitution, Article VI, clause 2
B. U.S. Constitutional Amendment I
C. U.S. Constitutional Amendment IV
D. 28 USC §1738
E. 42 USC §1983

D. RCW 9A.84.020

E. RCW 9A.76.020(1)

IV. STATEMENT OF THE CASE

On the evening of September 6, 1992, plaintiff Herbert Gulliford was part of a beach party crowd whose members repeatedly that evening had threatened both citizens and officials with violence. See Gulliford v. Pierce County, 136 F.3d 1345, 1347 (9th Cir.), cert. denied, 525 U.S. 828 (1998). In response to numerous calls for help, three Pierce County deputy sheriffs and a Washington State trooper arrived at the isolated and darkened scene of the threats to disperse the crowd and locate those who had committed the felony of threatening a fire fighter. However, when the officers repeatedly told the larger crowd to go home, the crowd did not disperse. Id.; United States v. Poocha, 2001 WL 880840, at * 3 (9th Cir. Aug. 7, 2001)(explaining that in Gulliford "police told the group to go home, but the crowd did not disperse.") Rather, plaintiff from the midst of the crowd made clear his refusal to disperse and apparently called for the crowd to do likewise by yelling: "why

don't you get the fuck off the island" and for the officers instead to "hop on the ferry and go back." Plaintiff was arrested by Pierce County Sheriff's Deputy Paul Thrash. Id.

Alleging jurisdiction under 28 USC §1331 and §1343, plaintiff thereafter filed in the Western District of Washington a 42 USC §1983 claim against Deputy Thrash and others for unlawful arrest and excessive force. During the three week trial defendants asserted, among other things, that there was probable cause to arrest for obstructing by plaintiff's failure to disperse and threatening behavior. See App. E; App. F at 3-4. The jury returned a defense verdict on all issues. Gulliford v. Pierce County, 136 F.3d 1345, 1347 (9th Cir. 1998). Plaintiff's motion for a new trial or judgment not withstanding the verdict was denied. App. G. Plaintiff then appealed to the Ninth Circuit Court of Appeals which unanimously affirmed the defense verdict on excessive force but in a split decision reversed the jury's verdict in favor of Deputy Thrash on unlawful arrest and remanded that issue for retrial. 136 F.3d at 1351. In so ruling,

two of the panel concluded that a district court instruction had allowed the jury to also find probable cause to arrest on the basis of "fighting words" which the majority concluded were not present. The majority further held Deputy Thrash could not raise qualified immunity on appeal as an additional ground to affirm the jury's verdict because -- though he had prevailed against plaintiff's claims in the District Court -- he "neglects to explain why it did not cross appeal on this issue . . . ." 136 F.3d at 1351.

The third member of the panel dissented, noting plaintiff had not raised that instructional objection throughout the trial, the district court did not know plaintiff's asserted objection to its instruction and, therefore, the "pointless formality exception" to FRCP 51 did not excuse plaintiff's failure to make that objection at trial. The dissent both "would affirm the judgment of the district court" and "not reach the question of qualified immunity . . . ." Id. at 1351 (O'Scannlain, J., dissenting).

Upon retrial of plaintiff's claims of unlawful arrest and

retaliation for the exercise of free speech, evidence again was presented and a second jury instructed on whether plaintiff's failure to disperse or his obstruction by use of threat or incitement of the crowd to violence were criminal acts accompanying his words. See App. H. This second jury again awarded a defense verdict. See Gulliford v. Thrash, 2001 WL 427285, at * 1 (9th Cir. Apr. 25, 2001). Plaintiff again moved for a directed verdict which again was denied. Id. Plaintiff again appealed and the Ninth Circuit again reversed on the ground one of the district court's instructions had in passing again used the undefined term "fighting words." Id. See also App. L at 4-15. The same majority that had reversed the first jury verdict further ruled that liability should have been directed against the deputy because "the district judge in the second trial abused his discretion" by instructing the jury to consider if there was probable cause to arrest for failure to disperse because that instruction had not been used in the first trial and "no reasonable and properly instructed jury" could find probable cause for ob-

structing an officer. Id. at *2-3. Accordingly, the majority remanded only for a "trial on the issue of damages." Id. at * 3.

The new panel member -- like the third member of the earlier panel -- dissented, noting the jury in the first trial had been allowed to consider plaintiff's failure to disperse as a means of obstructing and that from the record "probable cause to arrest could properly have been found based on Gulliford's failure to disperse . . . ." Id. at *3 (Fisher, J., dissenting). Over the dissent's further objection, rehearing was denied. App. D.

V. ARGUMENT

The decisions by two Ninth Circuit judges -- in conflict with the third panel member and with two separate and independent juries as well as two separate and independent district court judges -- orders a directed verdict against Deputy Thrash for unlawful arrest and precludes the jury from deciding any issue other than the amount of plaintiff's damages. In so ruling, the majority is not only "in conflict with the decision of another United States court of appeals on the same important matter," not

only "has decided an important federal question in a way that conflicts with relevant decisions of this Court," but "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ." See S.Ct. Rules 10 (a) and 10 (c).

1. Ninth Circuit Conflicts With Other Circuits By Requiring Officer Prevailing At Trial To File A Cross Appeal Or Be Held To Waive Qualified Immunity As Ground For Affirming His Verdict

In reversing the first defense verdict, the majority held Deputy Thrash had waived his right to assert qualified immunity as a ground for affirming the judgment because he "neglects to explain why [he] did not cross appeal on this issue from the district court's denial of [his] motion seeking qualified immunity" and an "appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." Gulliford v. Pierce County, 136 F.3d 1345, 1351 (9th Cir. 1998). This ruling on federal appellate procedure in civil rights cases directly conflicts with relevant decisions of this Court and other circuit courts of appeal.

This Court repeatedly has held as an "inveterate and certain" rule, Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480, 48 L.Ed.2d 784, 96 S.Ct. 2158 (1976), that an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." Id. (quoting United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L.Ed. 1087, 44 S.Ct. 560 (1924)). See also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 325 n. 3, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434, 84 L.Ed. 849, 60 S.Ct. 670 (1940). Deputy Thrash prevailed on all plaintiff's claims at trial so that his assertion of qualified immunity on appeal was not made "with a view toward enlarging [his] own rights" but to affirm the jury's verdict on a ground previously raised and supported by the record.

In not applying this Court's "inveterate and certain" rule

to a police officer's assertion of qualified immunity as a way to affirm a favorable jury verdict, the Ninth Circuit also is in direct conflict with that rule's application by other circuits under identical circumstances. In Powell v. Schriver, 175 F.3d 107, 113 (2nd Cir. 1999) an officer likewise asserted qualified immunity on appeal as an alternative ground for affirming his defense verdict. Plaintiff however argued, as the Ninth Circuit held here, that such had been waived by the defendant's failure to file a cross appeal of the denial of immunity by the District Court. Citing this Court's decision in United States v. American Railway Express Co. and its own precedent, the Second Circuit ruled plaintiff's argument "is meritless" because the "judgment entered was entirely in [the officer's] favor," and an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." 175 F.3d at 113. Similarly, in Sims v. Mulchahy, 902 F.2d 524, 545 (7th Cir.), cert.

denied, 498 U.S. 897 (1990), when a prevailing officer cross appealed to raise qualified immunity as an additional ground to affirm his jury verdict, he was harshly criticized by the Seventh Circuit for filing an "improper and unnecessary" appeal because "[c]ross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary." Id. (quoting Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987), cert. dismissed 485 U.S. 901 (1988)).

The Ninth Circuit decision in Gulliford v. Pierce County is irreconcilable with both this Court's decisions as well as with that of other circuits. See 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3904 n. 14 (supp. 2001) (in Gulliford "[i]t would have been better to put aside the cross-appeal observation.") Accordingly, a writ of certiorari is appropriate because the Ninth Circuit not only "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but "has decided an important question in a way that conflicts with relevant decisions of

this Court." S.Ct. Rule 10(a) and (c).

2. In Determining When Rights Are "Clearly Established" For Purposes Of Qualified Immunity, The Ninth Circuit Ignored Prior Precedent Including That Of The Officer's Home State

After ruling that qualified immunity had been waived, the majority in the first appeal summarily stated that in any case a "reasonable officer should have known that [plaintiff] was simply exercising" the "right of individuals in that community to question their government and the role of police." 136 F.3d at 1251 (citing Mackinney v. Nielsen, 69 F.2d 1002, 1007 (9th Cir. 1995)). In so doing, the Ninth Circuit majority committed the same error this Court identified in Anderson v. Creighton, 483 U.S. 635, 640-41, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987):

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right [defendant] was alleged to have violated ... was clearly established. The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which [defendant] was confronted did not constitute probable cause . . . .

(Emphasis added). See also Saucier v. Katz, 531 U.S. 991, 150

L.Ed.2d 272, 121 S.Ct. 2151, 2156 (2001)("This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . .").

Further, a "court engaging in review of a qualified immunity judgment should" also "use its 'full knowledge of its own [and other relevant] precedents.'" Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994)(quoting Davis v. Sherer, 468 U.S. 183, 192 n. 9, 104 S.Ct. 3012, 82 L. Ed.2d 139 (1984)(alteration in original)). See also Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990)(to overcome qualified immunity there must be "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.")(emphasis added). The Ninth Circuit's summary rejection of qualified immunity failed to fairly address relevent precedents of this Court, the Ninth Circuit and other Circuits that address the application of the constitutional issues in question in the context of circumstances similar to that which confronted Deputy

Thrash. See, e.g., Houston v. Hill, 482 U.S. 451, 462 n. 11, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987)("a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt[s] to engage the officer in conversation while the officer is directing traffic" or who "run[s] beside [an officer pursuing a felon] in a public street shouting at the officer."); United States v. Brice, 926 F.2d 925, 931 (9th Cir. 1991)(where citizen consistently refused to comply with official directions and instead asked "why," his arrest was upheld against First Amendment challenge because his conduct contained both speech and non-speech elements); Tatro v. Kervin, 41 F.3d 9, 18 (1st Cir. 1994)(where plaintiff was arrested when he said "I can't believe what is happening" after being ordered to leave a party, failure to disperse and not the chilling of free speech was the cause of his arrest); Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2nd Cir. 1992)(claim of retaliation for exercising free speech rejected where there was probable cause to believe crime had been committed).

More immediate to a state police officer, the Ninth Circuit majority ignored Deputy Thrash's own state's prior decision that had been decided under similar facts and similar constitutional challenges. Such state authority would have led any reasonable Washington State police officer to believe plaintiff's conduct of remaining and communicating both his intent to remain as well as his intent the deputies instead should leave, to be "acts which accompanied his words" for which he could be arrested. See State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421, rev. denied, 100 Wn.2d 1014 (1983)(First Amendment is not implicated by an arrest for obstructing under RCW 9A.76.020 of a person who attempts to talk to officers about arrest of another party goer after being told to leave). Hence any Washington police officer would believe Gulliford could be constitutionally arrested for failing to disperse and for obstructing their efforts to disperse the crowd and arrest a felon.

However the majority here declined even to discuss the Washington precedent cited it, presumably because the Ninth

Circuit only considers state law "in the absence of" what it considers "binding precedent." See Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). See also Ward v. County of San Diego, 791 F. 2d 1329, 1333 (9th Cir. 1986), cert. denied 483 U.S. 1020 (1987) ("the pronouncement of [the officer's state court] on a constitutional issue does not necessarily shield a government official from liability.") Such ignores that Washington judicial precedent on federal constitutional law is just as authoritative as Ninth Circuit law and just as "binding" on Deputy Thrash. See ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed. 2d 696 (1989)(state courts "possess the authority ... to render binding judicial decisions that rest on their own interpretations of federal law"); Lockhart v. Fretwell, 506 U.S. 364, 376, 113 S. Ct. 838, 122 L. Ed.2d 180 (1993)(THOMAS, J., concurring) ("neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.") See also Ari-

zonans for Official English v. Arizona, 520 U.S. 43, 58 n. 11, 137 L.Ed.2d 170, 117 S.Ct. 1055 (1997)(Ninth Circuit's belief state courts are not "coordinate and coequal with the lower federal courts on matters of federal law" deemed "remarkable."); U.S. Const., Art. VI, cl. 2 ("the Judges in every State shall be bound" by the "Constitution, and the Laws of the United States"); 28 USC §1738 ("judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . .")

Under the Ninth Circuit's forum centric approach the same action brought in state court would likewise ignore federal circuit court precedent and inconsistently consider only what law was "clearly established" by its own "binding" state court decisions. As one authority observes, if an officer's state precedent interpreting federal law is not considered in deciding what is "clearly established," regardless of which court plaintiff chooses to bring suit, forum shopping will -- as here -- decide the

outcome:

> [I]f federal and state decisional law with respect to a substantive constitutional question differs significantly, one strongly supporting the existence of the clearly established law that underlies the qualified immunity issue and the other strongly opposing it, the choice of forum is likely to be outcome derminative on the liability question. In such cases, plaintiffs and defendants would be especially well advised to select (and fight for) the forum whose law would favor their respective positions on the question of immunity. But whether such a system provides a coherent and sensible scheme for the adjudication of civil rights and liberties claims may be subject to question.

Richard B. Saphire, Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law, 35 Ariz. L. Rev. 621, 624 (1993). Finally, the Ninth Circuit's lack of full faith and credit to state decisions conflicts with the very rationale for qualified immunity because, when the substantive law changes depending on whether plaintiff files in state or federal court, state police cannot "reasonably anticipate when their conduct may give rise to liability for damages . . . ." C.f. Davis, 468 U.S. at 195.

This Court has never specifically addressed the role of state court precedent on federal questions in analyzing whether a right is "clearly established" for purposes of qualified immunity. See e.g. Harlow v. Fitzgerald, 457 U.S. 800, 819 n. 32, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)("we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."); Boreen v. Christensen, 280 Mont. 378, 930 P.2d 67, 71 (1996)("The United States Supreme Court has not established the requisite hierarchy of law from which to determine whether a right is clearly established."); Guffy v. Whatt, 18 F.3d 869, 872 (10th Cir. 1994)("While defendant contends that state decisional law is relevant to the qualified immunity inquiry, the role of state law remains unsettled."); Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988)("we have had no specific Supreme Court guidance in deciding when an issue becomes clearly established."); Saphire, 35 Ariz. L. Rev. at 627 (the Supreme Court has not "provided clear standards for de-

termining where courts should look to determine whether the rights asserted by the section 1983 plaintiff were clearly established" and in its absence "lower courts have not been uniform in their approaches to the issue."); Richard H. Fallon & Daniel J. Meltzer, New Law, Non-Retroactiviety, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1751 (1991)(years after Harlow the question of where to look for clearly established law "remains unresolved.") But c.f. O'Connor v. Donaldson, 422 U.S. 563, 577, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975)(prior to formulation of "clearly established" test circuit court was reversed because it "did not consider ... [defendant's] claimed reliance on state law" for purposes of qualified immunity). Accordingly, the Ninth Circuit's refusal to consider the effect of state court precedent in determining what case law controls whether a right is "clearly established," makes certiorari appropriate to finally decide the question of a state officer's liability where he relies on his state's decisional law for the determination of federal constitutional rights. S.Ct. Rule 10 (c).

3. Under The Guise Of The "Law Of The Case" And By Preempting A Jury's Fact Finding Role, The Ninth Circuit Improperly Directed Liability Because Plaintiff's Unlawful Act Was Accompanied By First Amendment Speech

In reversing the second jury verdict, the same majority as in the first appeal held that a verdict should have been directed against Deputy Thrash because the second jury should not have been allowed to decide if there was probable cause to arrest for failure to disperse and no reasonable jury could have found Gulliford obstructed the officers. See Gulliford v. Thrash, 2001 WL 427285 at *2 . This decision, which essentially holds probable cause to arrest for obstructing an officer does not exist if accompanied by First Amendment speech, so far departs "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S.Ct. Rule 10(a).

Though the dissent noted "probable cause to arrest could properly have been found based on Gulliford's failure to disperse," 2001 WL 427285 at *3; see also RCW 9A.84.020; Tatro, 41 F.3d at 18, the majority refused to consider the issue claiming

the judge in the first trial somehow excluded that issue from the first jury[1] and Deputy Thrash on appeal supposedly "does not justify the change in instructions by alleging any ... exception[]" to the "law of the case."[2] Id. at *1. Though such mistaken

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[1] As the dissent however noted, the first trial court "never ruled that the jury could not consider failure to disperse as a ground for probable cause" but "[t]o the contrary, . . . stated that there was a material issue of fact regarding whether Thrash had probable cause to arrest Gulliford based on failure to disperse and allowed both lay and expert testimony on the issue of failure to disperse." See 2001 WL 427285 at * 3 (Fisher, J., dissenting). See also App. E; App. I; App. J; App. K. Rather, as the dissent went on to observe, "[i]nstead of specifically instructing the jury on failure to disperse" the first district court "indicated that failure to disperse was arguable under the more general obstruction instruction, stating: 'Almost all of the theories that have been discussed this morning in this brief discussion are in these jury instructions. I have put them in different ways, obviously, than counsel suggested, but a great deal of what you have urged here by way of exception is entirely arguable under the jury instructions.'" See 2001 WL 427285 at * 3 (Fisher, J., dissenting). See also App. F at 4. Indeed, when plaintiff asked that first trial judge for a new trial after the first verdict on the express ground there was insufficient evidence to find criminal conduct, that same judge - again confirmed the "issues raised by Plaintiff were fully discussed and considered at trial." App. G, p. 1.

[2] On the contrary, Deputy Thrash's appellee brief to the Ninth Circuit expressly asserted:

> [A]pplication of the "law of the case" doctrine ... does not apply to decisions that are "erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 618 n. 8, 75 L.Ed.2d 318, 103 S.Ct. 1382 (1983); United States v. Pend Oreille County Public Utility Dist. No. 1, 135 F.3d 602, 608 (9th Cir. 1998); In Re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996). . . . . Here there was more than sufficient evidence in the first trial, [record citations omitted] --

conclusions only can be characterized as an outcome oriented abuse of appellate authority, see footnotes 1-2 supra.,[3] plaintiff's

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> as well as in the second, [record citations omitted] -- to support a jury in finding the crime of failure to disperse . . . . Plaintiff's "wooden" application of the law of the case is founded on a decision that was never made, and that if made would have been "erroneous" and "would work a manifest injustice."

App. L at 2-4 (emphasis added). As the dissent noted, "probable cause to arrest could properly have been found based on Gulliford's failure to disperse." 2001 WL 427285 at *3; see also Tatro, 41 F.3d at 18. Accordingly, preventing the jury from deciding probable cause for failure to disperse obviously would be "erroneous and would work a manifest injustice" and comes within the exception to the "law of the case" expressly asserted by Deputy Thrash. See 460 U.S. at 618 n. 8.

[3] Indeed, the issue was not properly before the Ninth Circuit to begin with because Deputy Thrash had noted that plaintiff again had failed to object at the second trial to the "failure to disperse" instruction on the ground the instruction violated the "law of the case." App. L at 1-2 n 7; App. H at p. 3; App. U; App. V. See also Coastal Distributing Co. v. NGK Spark Plug Co., 779 F.2d 1033, 1039 (5th Cir. 1986); Siegfried v. Kansas City Star Co., 298 F.2d 1, 7 (8th Cir.), cert denied, 369 U.S. 819 (1962). The majority made no claim in its second reversal, as it erroneously had in the first reversal over the dissent's objection, that the "pointless formality" exception somehow again excused plaintiff's failure to properly object in the second trial. See 136 F.3d at 1352-53 (O'Scannlain, dissenting)(plaintiff at the first trial objected only to the absence of a separate First Amendment claim and not, as he later asserted on appeal, that the court's instruction failed to state the First Amendment prevents verbal opposition from constituting probable cause under the Fourth Amendment). See also App. F at 1-3, 10; Gosvenor Properties Ltd v. Southmark Corp., 896 F.2d 1149, 1152 (9th Cir. 1990)("remarks made by counsel in chambers . . . and mere submission of proposed instructions did not clearly show that the issue was focused before the court."); Elliott v. S.D. Warren Co., 134 F.3d 1 (1st Cir. 1998)(FRCP 51 is mandatory and "an objection raised emphatically in chambers before delivery of the charge does not, without more, preserve for review issues relating to the charge").

failure to leave when ordered nevertheless also properly was considered by the jury in determining the crime of "obstructing" under RCW 9A.76.020. See 2001 WL 427285 at *3 (Fisher, J., dissenting) ("although the court did not give a specific failure to disperse instruction in the first trial, the jury was permitted to consider failure to disperse as a means of committing obstruction.") See also Hill, 482 U.S. at 462 n. 11; Lalonde, 35 Wn.App. at 61-62. Plaintiff's call at a tense moment from the midst of a larger darkened crowd -- while officers were attempting to disperse it and arrest a felon -- for the officers instead to leave, clarified that plaintiff meant to obstruct officers in their lawful efforts and was a further ground for finding a violation of RCW 9A.76.020. See App. M at 5-8; App. N at 1-6; App. O; App. P at 1-11; App. Q at 5; App. R.

Having improperly refused to consider the existence of probable cause either for "failure to disperse" or for "obstructing an officer" by failing to disperse, the majority then improperly assumed the role of the jury and rejected the possibility that a

"reasonable and properly instructed jury" also "could determine that Gulliford's words constituted an incitement to breach the peace as a theory of obstuction" or "find these words to be a true threat" because supposedly "Thrash offers only Gulliford's words" as a basis for probable cause. See 2001 WL 427285 at *2. Such a holding not only disregards the actual record[4] and well settled procedural rules on when a directed verdict is appropriate,[5] but makes the Ninth Circuit rather than the jury the ulti-

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[4] Even improperly ignoring -- as did the Ninth Circuit -- evidence that plaintiff refused to leave when lawfully ordered and that his "words" confirmed that intent, appellee's brief identified how "the record is replete with testimony that officials had been threatened that very evening by members of this same crowd and that the situation was tense and there was concern for the deputies' safety from the crowd when plaintiff called out from the midst of that same crowd for the deputies instead to leave, [App. M at 1-5, 8-18; App. N at 7; App. P at 14; App. Q; App. R at 2-4; App. S; App. T]," and that even "plaintiff himself testified he intended by his words to communicate to Deputy Thrash that 'if he was smart, he should leave.' [App. O at 19-20]." App. L at 12-13 (emphasis added). Under such a record, the defense that plaintiff issued a threat or attempted to incite the crowd cannot properly be excluded from the jury.

[5] A directed verdict is proper only "if, under the governing law, there can be but one reasonable conclusion," but if "reasonable minds could differ as to the import of the evidence ... a verdict should not be directed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 91 L. Ed.2d 202, 106 S.Ct. 2505 (1986). See also Howard v. Everex Systems, Inc., 228 F.3d 1057,1060 (9th Cir. 2000)("If conflicting inferences may be drawn from the facts, the case must go to the jury.") Here the record contains testimony at least allowing "conflicting inferences" concerning

mate fact finder whenever an arrestee accompanies his illegal acts with protected speech.

In the past the Ninth Circuit had properly accepted that the existence of a threat "is a question of fact for the jury, not a question of law for the court." Melugin v. Hames, 38 F.3d 1478, 1485 (9th Cir. 1994). See also Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)(a true threat "should be considered in light of their entire factual context, including surrounding events"); United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989), cert. denied, 493 U.S. 1082 (1990)(the "fact that a threat is subtle does not make it less of a threat.") Now, in reviewing cases concerning the existence of a true threat or incitement of a crowd that is accompanied by protected speech, the Ninth Circuit apparently relies on Gulliford to "engage[] in reweighing the evidence and making its own finding of the likelihood that [an ar-

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probable cause, see supra n. 4, and unless two juries, two district court judges and one out of three appellate judges on that same panel who differed with the majority all lacked "reasonable minds," as a matter of law the verdict was improperly directed. Such a departure from the proper appellate function itself calls for this Court's supervisory review.

restee's] utterance and expressive conduct were not 'likely to produce imminent lawless action.'" Poocha, 2001 WL 880848 * 7 (Aug. 7, 2001)(Tashima, J., dissenting)(dissenting because "whether the words and expressive conduct [the arrestee] used at the time and in the circumstances involved were likely to incite an immediate breach of the peace is a quintesssential factual inquiry and ... the majority, in its treatment of that question, has arrogated to itself the making of that finding . . . .")

Hence the manner in which the Ninth Circuit majority reached the issue and directed liability against Deputy Thrash so far departs from the accepted and usual course of judicial proceedings -- and continues to be used to justify similar departures in other cases -- as to call for an exercise of this Court's supervisory power. See S.Ct. Rule 10 (c).

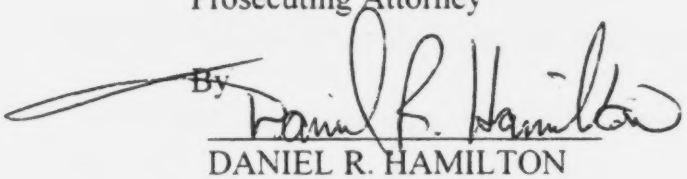
C. CONCLUSION

Only a writ of certiorari can remedy the Ninth Circuit's errors concerning these important federal questions -- and prevent their future repetition -- as well as avoid an improper appel-

late imposition of personal liability upon a police officer whom two juries, two district court judges and a circuit court judge have all found lawfully performed his duty under tense and uncertain circumstances.

DATED THIS 10TH DAY OF SEPTEMBER, 2001.

GERALD A. HORNE
Prosecuting Attorney

By 
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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

DEPUTY PAUL THRASH,

Petitioner/Appellee,

v.

HERBERT GULLIFORD,

Respondent/Appellant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITIONER'S APPENDIX

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APPENDIX

APP. A: 2/27/98 Opinion in Gulliford v. Pierce County,
APP. B: 4/9/98 Denial of petition for review
APP. C: 5/25/01 Opinion in Gulliford v. Thrash
APP. D: 6/4/01 Denial of petition for review
APP. E: 2/12/96 Order Denying P's S.J. Motion (CR 77)
APP. F: 4/8/96 Exceptions to Instructions (CR 162)
APP. G: 5/3/96 Order Denying P's JNOV (CR 156)
APP. H: 12/1/99 Court's Instructions To Jury (CR 301)
APP. I: 3/18/96-3/19/96 Transcript Trial Excerpts (CR 166)
APP. J: 3/20/96-3/27/96 Transcript Trial Excerpts (CR 167)
APP. K: 4/1/96-4/4/96 Transcript Trial Excerpts (CR 169)
APP. L: 5/15/00 Brief Of Appellee
APP. M: 11/29/99 Transcript Trial Excerpts (CR 314)
APP. N: 11/30/99 Transcript Trial Excerpts (CR 315)
APP. O: 11/23/99 Transcript Trial Excerpts (CR 319)
APP. P: 11/29/99 Transcript Trial Excerpts (CR 321)
APP. Q: 11/29/99 Transcript Trial Excerpts (CR 322)
APP. R: 11/30/99 Transcript Trial Excerpts (CR 324)
APP. S: 11/22/99 Transcript Trial Excerpts (CR 318)
APP. T: 11/29/99 Transcript Trial Excerpts (CR 323)
APP. U: 11/30/99 Transcript of Proceedings (CR 316)
APP. V: 12/1/99 Transcript of Proceedings (CR 317)
APP. W: U.S. Constitution, Article VI, clause 2
U.S. Constitutional Amendment I
U.S. Constitutional Amendment IV
28 USC §1738
42 USC §1983
RCW 9A.84.020
RCW 9A.76.020(1)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD,
Plaintiff-Appellant,

v.

PIERCE COUNTY, a municipality and governmental subdivision of the State of Washington; JOHN SHIELDS, Sheriff of Pierce County; PAUL THRASH, individually and as Pierce County Deputy Sheriff; TERRILL LARSON, individually and as Pierce County Deputy Sheriff; P. DONNELLY, individually, and as Pierce County Deputy Sheriff,
Defendants-Appellees.

No. 96-35614
D.C. No.
CV-94-05658-RJB
OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted
November 7, 1997—Seattle, Washington

Filed February 27, 1998

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain, Circuit Judges, and William W Schwarzer,* District Judge.

Opinion by Judge Fletcher; Partial Concurrence and Partial Dissent by Judge O'Scannlain

*Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Appendix "A"

OPINION

FLETCHER, Circuit Judge:

Herbert Gulliford appeals the judgment entered following a jury trial in his 42 U.S.C. § 1983 action against Pierce County and various law enforcement officials alleging that his constitutional rights were violated when he was arrested for obstructing a public servant and resisting arrest. Gulliford contends that the district court erred in its instructions to the jury regarding his wrongful arrest and excessive force claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for a new trial.

I.

On the evening of September 6, 1992, a group of individuals were gathered around a fire on the north beach of Herron Island, a small privately owned island located just within the borders of Pierce County, Washington, west of Key Peninsula. At about 9:20 p.m. that night, the Pierce County Sheriff's Department ("PCSD") received a call that someone in the environs of the group had threatened a woman's family. About two hours later, the PCSD received a report that "J.D.", a member of the group gathered on the beach, had threatened a firefighter who attempted to extinguish the group's fire. In response, the three named deputy sheriffs, Thrash, Larson and Donnelly, were dispatched to the island to arrest J.D. and extinguish the fire.

Upon arriving on the island, the deputies were informed that J.D. had gone home. Deputy Thrash told the group, "This party is over, people," but none of the members left the beach. In response to Deputy Thrash's next statement that "I'm tired of this. This is a waste of government . . . ," Gulliford replied, "Then why don't you hop on the ferry, hop on the ferry and go back." Deputy Thrash then maneuvered through the crowd, grabbed Gulliford from behind, and placed him under arrest

for obstructing a public servant in violation of Wash. Rev. Code. § 9A.76.020.[1]

At this point, Gulliford intentionally fell to a sitting position and refused to comply with orders to stand and put his hands behind his back. The deputies grabbed Gulliford's arms, put him in a "hair hold," and placed a knee in his back. Although Gulliford did not kick out at or otherwise assault the officers, he continued passively to resist arrest. Deputies Larson and Donnelly then sprayed pepper spray in Gulliford's face. The deputies were eventually able to get one of Gulliford's wrists in handcuffs, and, after a second spraying in the face with pepper spray, Gulliford ceased resisting. Gulliford was additionally cited for resisting arrest pursuant to Wash. Rev. Code § 9A.76.040.[2]

Gulliford was taken to the Pierce County Jail and held there until he posted bond. The deputies never claimed that they thought that Gulliford was "J.D.", and no charges were ever filed against Gulliford. Gulliford contends that he suffered permanent injuries as a result of the officers' use of force in effecting the arrest.

Claiming that he was wrongfully arrested and that the deputies used excessive force in violation of his First, Fourth and Fourteenth Amendment rights, Gulliford filed this § 1983 action against Pierce County, Pierce County Sheriff John Shields, and, in their individual as well as official capacities, the three deputies, Thrash, Larson and Donnelly. The claims

[1]Wash. Rev. Code § 9A.76.020 provides in pertinent part: "Every person who . . . (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor."

[2]Wash. Rev. Code § 9A.76.040 provides: "(1) A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him. (2) Resisting arrest is a misdemeanor."

against Pierce County, however, were dismissed by stipulation of the parties on October 30, 1995.[3]

The case was tried for three weeks before an eight person jury, although the wrongful arrest claims as to Larson and Donnelly were dismissed on defendant's motion for a directed verdict and were never submitted to the jury. The jury returned verdicts for Deputy Thrash on the wrongful arrest claim and for all defendants on the excessive force claim.

II.

Gulliford contends that two of the instructions given to the jury were erroneous. "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). When the alleged error is in the formulation of the instructions, the instructions are to be considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate. *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir. 1996). However, when the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. *Fireman's Fund Ins. Cos. v. Alaskan Pride Partnership*, 106 F.3d 1465, 1469 (9th Cir. 1997).

A.

Jury Instruction Number 15 stated in pertinent part:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action with-

[3]The references in this opinion to arguments by "Pierce County" refer to Pierce County Deputy Prosecuting Attorney Daniel R. Hamilton, who argued the instant appeal on behalf of the Pierce County Deputy Sheriffs.

> out risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties.

On appeal, Gulliford claims that his arrest for Obstructing a Public Servant was without probable cause. He contends that Jury Instruction Number 15 does not state a crime because verbal protests or challenges to the police are permitted, even if they knowingly hinder, delay or obstruct the police. To be criminal, the words must be fighting words. He makes the further point that § 9A.76.020, which prohibits hindering, delaying or obstructing a public servant, criminalizes conduct only, not words. He is correct.

As a preliminary matter, Pierce County argues that Gulliford is precluded from raising this issue on appeal because he failed to object properly at trial. Specifically, Pierce County contends that the record of Gulliford's exceptions to Jury Instruction Number 15 "is devoid of any mention of the First Amendment's claimed effect on probable cause . . . ."[4]

[1] Federal Rule of Civil Procedure 51 provides that "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." It is the responsibility of the litigants to ensure compliance with FRCP 51, and we have generally interpreted that rule "strictly." *McGonigle v. Combs,* 968 F.2d 810, 823 (9th Cir.), *cert. dis-*

[4]Pierce County asserts that the entirety of Gulliford's argument to the District Court regarding Jury Instruction Number 15 was as follows:

> It does not include a claim for specific First Amendment violation, and as we indicated in our trial brief and in discussion previously with the court, we believe that both the First Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

missed, 506 U.S. 948 (1992). However, we have recognized "a limited exception" to the strict interpretation of FRCP 51: " 'Where the district court is aware of the party's concerns with an instruction, and further objection would be unavailing, we will not require a futile formal objection.' " *Id.* (citation omitted). Specifically, we have held that such an objection is a pointless formality " 'when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction.' " *Glover v. BIC Corp.,* 6 F.3d 1318, 1326 (9th Cir. 1993) (quoting *United States v. Payne,* 944 F.2d 1458, 1464 (9th Cir. 1991), *cert. denied,* 503 U.S. 975 (1992)).

[2] Gulliford meets the requirements of the "pointless formality" test. The instruction he proposed (No. 31) stated:

> Defendants claim that they had probable cause to arrest plaintiff for obstructing a police officer in the conduct of his lawful duties. The First Amendment protects the right of citizens to verbally opposed and/ or challenge police action so long as that challenge does not involve a threat or fighting words.
>
> * * *
>
> *City of Houston v. Hill,*
> 482 U.S. 451, 462, 107 S.Ct. 2502, 2510 (1987)

[3] As in *Glover v. BIC Corp.,* Gulliford's proposed instruction was an "accurate statement[ ] of the law which should have brought to the court's attention the failure of the general charge to adequately address the issue of" probable cause. 6 F.3d at 1327. In *Glover,* we held that such a proposed instruction was sufficient despite the party's failure to object to instructions as given. *Id.* Here, in contrast to *Glover,* not only did Gulliford propose an alternative jury instruction, he

also objected in open court to Jury Instruction Number 15, albeit in less specific terms, and the parties concede that additional discussions regarding the jury instructions occurred off the record in chambers.[5] We are thus satisfied that the district court knew of Gulliford's grounds for disagreement, and that, on the instant record, the "proposed [probable cause] instruction[ ] will serve as an objection to the instructions given the jury." *Id.*; *cf. United States v. Payne*, 944 F.2d 1458, 1463-64 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992) (specific objection not a "pointless formality" where it was clear from the record that failure to give a presumption of innocence instruction was due to simple oversight and counsel failed to alert the court to the omission when it pointedly asked whether there were any objections to the instructions read to the jury). As a result, Gulliford is not precluded from raising on appeal his objection to Jury Instruction Number 15.[6]

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[5]Pierce County cites *Benigni v. City of Hemet*, 879 F.2d 473, 475-76 (9th Cir. 1988), for the proposition that, notwithstanding Gulliford's proposed alternative jury instruction, his objection was not properly preserved because "the trial court was not made aware of any specific concern with the proposed instructions." However, unlike Gulliford, the litigant in *Benigni* made no oral objection or argument whatsoever at trial. *Id.* at 476. Pierce County concedes that Gulliford by contrast did make an oral objection to Jury Instruction Number 15 specifically regarding the First Amendment. Although the precise articulation of Gulliford's First Amendment argument was not as artfully presented in his oral objection as it was in his alternative jury instruction, it was sufficient to give the court "an opportunity to modify the instruction and incorporate the elements of the . . . proposed instructions." *Id.*

[6]Judge O'Scannlain's partial dissent suggests that this case is controlled by *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1990), in which we held that Southmark failed to comply with the requirements of FRCP 51 notwithstanding the fact that Southmark offered an alternative jury instruction. *See* infra at 1626, 1629–30. However, in contrast to the instant case, the alternative jury instruction in *Grosvenor* failed "to state distinctly the matter objected to and the ground of the objection as required by Rule 51." 896 F.2d at 1153. Gulliford's proposed jury instruction, on the other hand, precisely articulated the matter objected to and the grounds of the objection, much like the alternative

[4] The Supreme Court has consistently held that the First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is " 'shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.' " *City of Houston, Texas v. Hill,* 482 U.S. 451, 461-63 (1987) (quoting *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)); *see also Lewis v. City of New Orleans,* 415 U.S. 130, 132-134 (1974).

In *Hill,* a case with facts substantially similar to those before us, the appellee shouted at police officers who had approached his friend to "pick on somebody your own size." *Id.* at 454. Hill was arrested under a city ordinance that prohibited "oppos[ing], molest[ing], abus[ing] or interrupt[ing] any policeman in the execution of his duty." *Id.* at 455. Although Hill was acquitted, he brought an action seeking to strike the ordinance as unconstitutional on its face. *Id.* The Supreme Court agreed, emphasizing that "[t]he Constitution does not allow such speech to be made a crime," and that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63.

Similarly, in *Lewis v. City of New Orleans,* as later recounted in *Hill,* the appellant yelled obscenities at an officer who had asked appellant's husband to produce his driver's license. *Id.* at 461. Lewis was convicted under a municipal ordinance that made it a crime "for any person wantonly to curse or revile or to use obscene or opprobious language

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instruction in *Brown v. Avemco Inv. Corp.,* 603 F.2d 1367 (9th Cir. 1979), cited with approval in *Grosvenor,* 896 F.2d at 1153. As we noted in *Grosvenor,* the plaintiff in *Brown* adequately complied with the requirements of FRCP 51 because his proposed instruction was sufficiently clear to focus the issue for the jury. *See id.*

toward or with reference to any member of the city police while in the actual performance of his duty." *Lewis,* 415 U.S. at 132. The Supreme Court vacated the conviction and invalidated the ordinance as facially overbroad, explaining that the ordinance was not limited in scope to "fighting words" that " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' " *Id.* at 133 (quoting *Gooding v. Wilson,* 405 U.S. 518, 525 (1972)).

Relying, *inter alia,* on the Supreme Court's decision in *Hill,* we ruled in *Mackinney v. Nielsen* that expressive conduct such as writing with chalk on the sidewalk does not itself create probable cause for arrest, and that verbally protesting an officer's order to stop writing is protected by the First Amendment. *See* 69 F.3d 1002, 1007-08 (9th Cir. 1995). The decision in *Mackinney* also relied on *Duran v. City of Douglas,* in which we emphasized that "criticism of the police is not a crime," and that "while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful but protected by the First Amendment." 904 F.2d 1372, 1377, 1378 (9th Cir. 1990).

[5] The facts before us are indistinguishable from those in *Hill* and its progeny. If anything, Gulliford's suggestion that Deputy Thrash "hop on the ferry"[7] is less provocative than the

[7]Pierce County contends that Gulliford's statement included profanity. However, the testimony of the PCSD deputies is somewhat inconsistent on this point. Deputy Thrash wrote in his report that Gulliford said "Then why don't you get the fuck off the island." Deputy Donnelly wrote in his report that "A person on the far side of the fire said why don't you leave the fuckin[g] island. [Deputy Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." Finally, Deputy Larson wrote that "Thrash told them to leave and told them we were tired of coming over to stop these problems, no one moved and a male voice to my right said something to the effect of 'Then get the hell off the island.' Thrash walked over and grabbed the only male around, he had been crouching down between two women when he said it. Thrash told him he was under arrest . . . ." In any event, whether Gulliford may have used profanity does not affect the analysis.

"opprobious language" found in those cases. Jury Instruction Number 15 misstates the law or is at best misleading since it does not state that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes "fighting words." *See Hill,* 482 U.S. at 465-67; *see also Mackinney,* 69 F.3d at 1007-08; *Duran,* 904 F.2d at 1377-78. We agree that Jury Instruction Number 15 was impermissibly misleading, warranting reversal unless the error was harmless.

[6] In a civil case, "[i]f a jury instruction is erroneous, we will reverse the judgment unless the error is more probably than not harmless." *Chuman v. Wright,* 76 F.3d 292, 294 (9th Cir. 1996). Here, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone because that is all that Gulliford did—he spoke. As a matter of law, the words spoken were not "fighting words." Accordingly, we reverse and remand for a new trial on this claim.

B.

Jury Instruction Number 14 stated:

> An individual has a limited right to offer reasonable resistance to an arrest made without probable cause, but only if the arrest is the product of the officer's bad faith, provocative conduct, or personal frolic. In such a case, the amount of force used to resist an unlawful arrest must be reasonable and proportioned to the injury attempted upon the arrestee.

On appeal, Gulliford argues that this jury instruction was erroneously based on federal law rather than Washington State law.

[7] The objection is not well taken. We need not go beyond the observation that the Washington law on this point is substantially indistinguishable from the federal law. The Wash-

ington state case quoted by Gulliford states that a "person being illegally arrested may use reasonable and proportional force to resist the arrest." *State v. McCrorey,* 851 P.2d 1234 (Wash. Ct. App. 1993) (citing *State v. Hornaday,* 713 P.2d 71 (Wash. 1986)). This "reasonable and proportional" standard is to all appearances identical to the one found in Jury Instruction 14.

[8] Accordingly, the district court did not err in instructing the jury under federal rather than Washington State law with regard to Gulliford's claim that the arresting officers used excessive force.

III.

[9] Pierce County argues on appeal that Deputy Thrash is entitled to qualified immunity from Gulliford's wrongful arrest claim and that all of the deputies are entitled to qualified immunity from Gulliford's excessive force claim. However, Pierce County neglects to explain why it did not cross-appeal on this issue from the district court's denial of its motion seeking qualified immunity.

[10] As we recently reiterated, "[a]n appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." *Spurlock v. FBI,* 69 F.3d 1010, 1018 (9th Cir. 1995) (citing *Turpen v. City of Corvalis,* 26 F.3d 978, 980 (9th Cir.), *cert. denied,* 513 U.S. 963 (1994)).

[11] Moreover, even if Pierce County had cross-appealed, it does not appear that the district court erred in denying the officials qualified immunity. As we explained in *Mackinney v. Nielsen,* "the Supreme Court instructed courts ruling on qualified immunity to examine whether the 'contours of the right' at stake in the action are sufficiently clear so that a reasonable official could understand that he or she is violating

the right." 69 F.3d 1002, 1006-07 (9th Cir. 1995). We ultimately concluded in that case that

> Police officers have a difficult job, and they deserve the respect of their community. But they in turn must respect the right of individuals in that community to question their government and the role of the police. A reasonable officer should have known that Mackinney was simply exercising that right.
>
> *Id.* at 1007.

AFFIRMED in part, REVERSED in part, and REMANDED for a new trial. Appellee to bear costs.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

I would affirm the judgment of the district court. Regrettably, I cannot join Section II.A's discussion of the jury instruction on verbal opposition to police action, which, in my view, threatens "[t]his court['s] . . . reputation as the strictest enforcer of Rule 51," *Hammer v. Gross,* 932 F.2d 842, 847 (9th Cir. 1991), and creates a direct intra-circuit conflict with *Grosvenor Properties Ltd. v. Southmark Corp.,* 896 F.2d 1149 (9th Cir. 1990). Therefore, I respectfully dissent and would not reach the question of qualified immunity, which the majority discusses in Part III.

I

Federal Rule of Civil Procedure 51 states:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict,

> *stating distinctly* the matter objected to and *the grounds of the objection.*

Fed. R. Civ. P. 51 (emphasis added). Our court has "interpreted this rule strictly and ha[s] stated that, '[i]n a civil case, we may not review a jury instruction in the absence of a proper objection.' " *McGonigle v. Combs,* 968 F.2d 810, 823 (9th Cir. 1992) (quoting *Larez v. City of Los Angeles,* 946 F.2d 630, 638 (9th Cir. 1991)); *see also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 674 (1971) ("[T]he Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to instruction in a civil case.") The party objecting to the instruction must bring "into focus *the precise nature* of the alleged error in the district court's instruction." *McGonigle,* 968 F.2d at 824 (emphasis added).

Gulliford now argues that he was arrested for obstructing a police officer without probable cause in violation of the Fourth Amendment. He does not claim on appeal that his First Amendment right verbally to hinder, delay, or obstruct the police was also violated.

Gulliford correctly argues before this court that jury instruction 15[1] was flawed because it failed to inform the jury that the police lacked probable cause to arrest him for speech that "knowingly hinder[ed], delay[ed], or obstruct[ed]" the police but did not include "fighting words [ ]or . . . obscene or opprobrious language." *Houston v. Hill,* 482 U.S. 451, 461 (1987). Gulliford's objection to jury instruction 15 at trial rested on an entirely different ground. Gulliford's argument was as follows:

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[1]Jury instruction 15 stated:

> The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties.

> [The instruction] does not include a claim for a specific First Amendment violation, and as we indicated in our trial brief and in discussions previously with the court, we believe that both the First Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

In other words, Gulliford argued at trial that instruction 15 did not separately address his (now abandoned) claim that his First Amendment rights had been violated as well. Gulliford's (perhaps incorrect) argument was that the instruction *was exclusively concerned with* his Fourth Amendment claim — not that the instruction *misstated the elements of* that claim.

Of course, the contours of Gulliford's Fourth Amendment claim are shaped both by Wash. Rev. Code § 9A.76.020 — the Washington statute that prohibits obstruction of law enforcement officers — and by the First Amendment. Section 9A.76.020 provides: "Every person who . . . (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor." Meanwhile, the First Amendment gives individuals the right to verbally obstruct public servants as long as they do not use "fighting words [ ]or . . . obscene or opprobrious language." *Houston v. Hill,* 482 U.S. 451, 462 (1987). Viewed in conjunction with Wash. Rev. Code § 9A.76.020, the First Amendment helps to define Gulliford's right under the Fourth Amendment not to be arrested for obstructing the police without probable cause.

However, Gulliford's objection at trial to jury instruction 15 had nothing to do with his rights under the Fourth Amendment. Rather, Gulliford wanted the district court to instruct the jury *separately* regarding an alleged violation of his First Amendment right to verbally obstruct police officers. Because Gulliford failed to "*stat[e] distinctly* the matter objected to and the grounds of [his] objection [at trial]," Fed. R. Civ. P.

51 (emphasis added), he is precluded from raising his Fourth Amendment argument on appeal.

II

The majority invokes the "pointless formality" exception to Rule 51. As we explained in *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991), "an objection may be a 'pointless formality' when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." *Id.* at 1464.

It is undisputed by the parties that Gulliford offered an alternative instruction. Gulliford has failed to demonstrate, however, either that "throughout the trial [he] argued the disputed matter with the court," or that "*it is clear from the record* that the court knew [Gulliford's] grounds for disagreement with the instruction." *Id.* (emphasis added). Apart from noting that Gulliford submitted an alternative instruction (thereby satisfying only the third element of the pointless formality test), the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here.

In *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149 (9th Cir. 1990), the defendants submitted an alternative jury instruction that was rejected by the district court. *See id.* at 1152. At a sidebar conference called to consider the instructions, the defendants stated that their proposed instruction had not been given. *See id.* The district court responded that it had rejected the instruction and that it was unnecessary for counsel to repeat previously submitted instructions or objections. *See id.* We held that such a "sequence of events is not sufficient to constitute a sufficient objection to the instructions that were given, as Rule 51 is applied in this circuit." *Id.* If the defendants in *Grosvenor* did not succeed in

preserving their objection despite complaining that their proposed instruction had not been given, then certainly Gulliford, who did nothing to call attention to the district court's rejection of his instruction, failed to preserve his objection.

In an attempt to distinguish *Grosvenor,* the majority relies upon a sentence from that opinion. *See* Majority Opinion at 1621 n.6 ("However, in contrast to the instant case, the alternative jury instruction in *Grosvenor* failed 'to state distinctly the matter objected to and the ground of the objection as required by Rule 51.' ") (quoting *Grosvenor,* 896 F.2d at 1153). The relevant passage in *Grosvenor,* however, states, in full:

> Southmark argues that it made the required specific objection to the instruction that failed to state that termination of the joint venture would end fiduciary duty, and that it submitted alternative theories of liability to the jury by way of special verdict questions. It contends that it did so by its submission of proposed jury instruction 22. In addition, at a sidebar conference called to consider corrections and additions to the instructions, Southmark's counsel stated that instruction 22 had not been given and the court responded that it had rejected that instruction. At that same conference the court noted that it was not necessary for counsel to repeat previously submitted instructions or objections.
>
> *However, this sequence of events is not sufficient to constitute a sufficient objection to the instructions that were given, as Rule 51 is applied in this circuit.* This court has held that remarks made by counsel in chambers, discussion of law in pretrial memoranda and mere submission of proposed instructions did not clearly show that the issue was focused before the court.

> *In addition,* an examination of proposed instruction 22 suggests that it was not sufficient to state distinctly the matter objected to and the ground of the objection as required by Rule 51.

Id. at 1152-53 (internal citations omitted). As the above passage demonstrates, our *holding* in *Grosvenor,* that a "sequence of events" which includes the submission of an alternative jury instruction does not "constitute a sufficient objection to the instructions that were given," did not turn on whether that alternative instruction "state[d] distinctly the matter objected to and the ground of the objection." *Id.* Although we observed ("addition[ally]") in *Grosvenor* that the alternative instruction was unclear, *id.* at 1153 (citing *Brown v. Avemco Inv. Corp.,* 603 F.2d 1367, 1371 (9th Cir. 1979)), the clarity of the alternative instruction was irrelevant to *Grosvenor*'s analysis of the "sufficien[cy]" of the relevant "sequence of events." *Id.* at 1152. Far from distinguishing *Grosvenor,* the majority's discussion of that case demonstrates why the majority opinion is in direct conflict with it.

I respectfully dissent.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD Plaintiff-Appellee, v. PIERCE COUNTY, a municipality and governmental subdivision of the State of Washington JOHN SHIELDS, Sheriff of Pierce County; PAUL THRASH, individually and as Pierce County Deputy Sheriff; TERRILL LARSON, individually and as Pierce County Deputy Sheriff; P. DONNELLY, individually, and as Pierce County Deputy Sheriff, Defendants-Appellees.	No. 96-35615 D.C. No. CV-94-05658-RJB ORDER

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* District Judge.

Judges Fletcher and Schwarzer vote to deny the petition for rehearing.

Judge O'Scannlain would grant rehearing.

Judge Fletcher votes to deny the

Appendix "B"

suggestion for rehearing en banc and Judge Schwarzer so recommends. Judge O'Scannlain would grant the rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD,	)	
	)	NO. 00-35005
Plaintiff-Appellee,	)	
	)	D.C. No.
	)	CV-94-05658-FDB
v.	)	
	)	MEMORANDUM*
PAUL THRASH,	)	
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States
District Court
Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted December 7, 2000
Seattle, Washington

BEFORE: B. FLETCHER and FISHER, Circuit Judges, and SCHWARZER, **
Senior District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Herbert Gulliford appeals from an adverse verdict in his § 1983 action against Pierce County and various law enforcement officers. Gulliford claimed that his arrest by the deputy sheriffs violated his Fourth Amendment rights. On a prior appeal, we affirmed a defense verdict on his excessive force claim. However, we remanded because the court's instruction had permitted the jury to find probable cause to arrest on the basis of words that we held as a matter of law did not constitute fighting words. *See Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998)(*Gulliford I*)(stating the relevant facts). At the conclusion of the second trial, the jury again returned a verdict for the defendants. Gulliford's motion for a directed verdict was denied.

Gulliford contends that Instruction No. 16 permitted the jury to find that his statements to the deputies were fighting words and therefore not protected by the First Amendment. *Gulliford I* held that the words spoken by him as a matter of law were not fighting words. 136 F.3d at 1350. "[I]f a jury in-

struction is erroneous, we will reverse the judgment unless the error is more probably than not harmless." *Id.* (quoting *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996)). Because the jury may have based its verdict on Gulliford's words alone, as Instruction No. 16 permitted, we cannot say that the error was more probably than not harmless and will reverse. *See Chuman*, 76 F.3d at 295.

Gulliford further contends that the court erred in formulating Instruction No. 10, which allowed the jury to find probable cause to arrest Gulliford for failure to disperse, an offense under WASH. REV. CODE § 9A.84.020. At the first trial, the district court instructed the jury that they should determine whether Thrash had probable cause to arrest for obstructing, and they "should not consider whether there was probable cause to arrest for other crimes." Gulliford argues that under the law of the case doctrine, the district court at the second trial should not have allowed the jury to find probable cause based on crimes other than obstructing.

A district court's decision whether to apply the law of the case doctrine is reviewed for abuse of discretion. *See Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998). Generally, the law of the case doctrine precludes the reconsideration of issues already decided by an appellate court. *See United States v. Hughes Aircraft Co.*, 2001 WL 277805 (9th Cir. 2001). It has also been used as a rule of comity for decisions made by trial courts. *See United States v. Estrada-Lucas*, 651 F.2d 1261, 1264-1265 (9th Cir. 1980). Absent the exceptions noted in *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993),[1] the second trial judge's failure to follow the law of the case constitutes an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). Thrash does not justify the change in instructions by alleging any of these exceptions. We therefore find that the district judge in the

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[1] A district court is not bound by a prior district court decision in the case where "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result."

second trial abused his discretion by formulating jury instructions in violation of the law of the case.

Thrash claims that the first district court's instruction incorporated failure to disperse. In other words, Thrash argues the jury in the first trial could have found that Gulliford committed the crime of obstruction by committing the failure to disperse crime. In reviewing the trial transcript, however, we find no indication that the district judge incorporated the failure to disperse crime in the instruction. While Thrash did ask for separate instructions on failure to disperse and other crimes, the district judge responded that such instructions would be counterproductive and a smoke screen for the real issues in the case. It follows from our determination that the district court at the second trial violated the law of the case, and that ap properly instructed jury should have been restricted to finding probable cause based only on obstruction.

To determine whether Gulliford was entitled to a directed verdict, we must decide whether a jury could reasonably

find that Thrash had probable cause to arrest Gulliford for obstruction. Thrash argues that Gulliford committed the obstruction offense by speaking words constituting an incitement to riot, an incitement to breach the peace, and a threat.

As to incitement to riot, it is a separate offense, not a theory of obstruction. It is properly charged under WASH. REV. CODE § 9A.84.010: "A person is guilty of the crime of riot if, acting with three or more other persons, he knowingly and unlawfully uses or threatens to use force, or in any way participates in the use of such force, against any other person or against property." There is no evidence that Gulliford used or threatened to use force or participated in the use of force. As to incitement to breach the peace, it is the essence of "fighting words." *See R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 413 (1992)(White, J., concurring)(quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942): "by their very utterance, [fighting words] inflict injury or tend to incite an immediate breach of the peace.") *Gulliford I* holds that as

a matter of law, Gulliford's words did not constitute fighting words. 136 F.3d at 1350. Hence, no reasonable and properly instructed jury could determine that Gulliford's words constituted an incitement to breach the peace as a theory of obstruction.

Finally, as to threats, Thrash presented no evidence that Gulliford's words were threats constituting the obstruction crime. To fall outside of First Amendment protection, a statement must be a "true threat," meaning that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates as a serious expression of intent to harm or assault." *See Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 372 (9th Cir. 1996)(quoting *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990)). Thrash offers only Gulliford's words: "Then why don't you hop on the ferry, hop on the ferry and go back." Even viewing the words in their relevant context, no reasonable jury could find these words to be a true threat.

Because the jury could not return a verdict on the basis of Gulliford's words, and defendants have presented no viable basis to support a finding of probable cause to arrest Gulliford, the motion for directed verdict should have been granted.

Accordingly, we REVERSE the judgment and REMAND for trial on damages.

REVERSED AND REMANDED.

Gulliford v. Trash, No. 00-35005

Fisher, Circuit Judge, dissenting:

I respectfully dissent from the majority's holding that Jury Instruction No. 10, on failure to disperse, violated the law of the case and was an abuse of discretion.

The district court, in Gulliford's first trial, never ruled that the jury could not consider failure to disperse as a ground for probable cause to arrest. To the contrary, the court stated that there was a material issue of fact regarding whether Thrash had probable cause to arrest Gullifford based on failure to disperse and allowed both lay and expert testimony on the issue

of failure to disperse. Instead of specifically instructing the jury on failure to disperse, however, the court provided only a more general obstruction instruction.[1] When Deputy Thrash requested a specific jury instruction on failure to disperse, the court indicated that failure to disperse was arguable under the more general obstruction instruction, stating: "Almost all of the theories that have been discussed this morning in this brief discussion are in these jury instructions. I have put them in different ways, obviously, than counsel suggested, but a great deal of what you have urged here by way of exception is entirely arguable under the jury instructions." Thus, although the court did not give a specific failure to disperse instruction in the first trial, the jury was permitted to consider failure to disperse as a means of committing obstruction. I do not agree with the majority's assertion that the district court was referring

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[1] The obstruction instruction, in the first trial, read: "A person commits a crime of obstructing a public servant when he knowingly hinders, delays, or obstructs any public servant in the discharge of the public servant's official powers or duties.

to failure to disperse when he remarked about instructions that would have been counterproductive or a smokescreen.

Given that the court, in the first trial, allowed the jury to consider failure to disperse under the obstruction instruction, the law of the case did not prevent the court, in the second trial, from instructing the jury on failure to disperse. Accordingly, its decision to give such an instruction did not constitute an abuse of discretion.

Although probable cause to arrest could properly have been found based on Gulliford's failure to disperse, I agree that Instruction Number 16 improperly allowed the jury to find probable cause to arrested based on words that did not, as a matter of law, constitute fighting words. I would therefore remand the case for consideration before a properly instructed jury.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT GULLIFORD,	)	
	)	NO. 00-35005
Plaintiff-Appellee,	)	
	)	D.C. No.
	)	CV-94-05658-FDB
v.	)	
	)	ORDER
PAUL THRASH,	)	
	)	
Defendant-Appellee.	)	
	)	

BEFORE: B. FLETCHER and FISHER, Circuit Judges, and SCHWARZER,[1] Senior District Judge

Judge Fletcher and Judge Schwarzer vote to deny appellee's petition for rehearing; Judge Fisher votes to grant the petition for rehearing. Judge Fletcher and Fisher vote to reject the petition for rehearing en banc and Judge Schwarzer so recommends.

The full court has been advised of the suggestion for

[1] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App.P.35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658RJB
Plaintiff,	)	
	)	ORDER DENYING
v.	)	PLAINTIFF'S
	)	MOTION FOR
PAUL THRASH, TERRILL	)	PARTIAL SUMMARY
LARSON, and P.	)	JUDGMENT
DONNELLY,	)	
individually,	)	
	)	
Defendants.	)	

THIS MATTER comes before the court on plaintiff's Motion for Partial Summary Judgment. The court has considered the pleadings and exhibits (including a videotape) filed in support and opposition, and file herein.

* * * * *

2. Obstruction of a Public Servant (RCW 9A.76.020(3))

RCW 9A.76.020(1) states in part:

(1) A person is guilty of obstructing a law enforcement officer if the person wilfully hinders, delays, or obstructs any law enforcement officer in the discharge

Appendix "E"

of his official powers or duties.

Plaintiff argues that his acts did not hinder, delay or obstruct the deputies in their duties. Plaintiff argues that defendants cannot point to anything specific that shows how they were obstructed in carrying out their duties. Plaintiff argues that it takes more than speech to convict a person for obstructing and plaintiff did not act in this situation.

Defendants argue that in light of the events that happened that evening an officer could reasonably believe that plaintiff's statement and act of remaining around the fire were an attempt to hinder, delay, or obstruct the deputies in the discharge of their official duties. Defendants argue that the deputies did not complete their official duties in assisting the fire department in extinguishing the fire, arresting the individual who allegedly threatened the fire fighter, and dispersing the crowd and that plaintiff's conduct of remaining at the fire accompanied with his statement would lead a reasonable officer to believe that plaintiff was attempting to obstruct the

deputies.

In *State v. Lalonde*, 35 Wash. App. 54, 61 (1983), the Court of Appeals agreed with the trial judge that the defendant's offense of obstructing a public servant did not arise from his speech, but from the acts which accompanied his words.

Viewing the facts in light most favorable to the defendants, plaintiff's conduct of remaining at the scene in addition to the statement he made to the deputies creates a issue of material fact regarding whether the officers had probable cause to arrest plaintiff for obstruction of a public servant. Therefore, the court should deny plaintiff's motion in this issue.

3. Threatening to Influence a Public Servant's Actions (RCW 9A.76.180), Creating a Reasonable Fear of Violence by a Threat (RCW 9A.46.020), Threatening Another With Force (RCW 9A.84.010)

a. Threat

RCW 9A.76.180 states in part:

(1) A person is guilty of intimidating a public servant if, by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant. . .

RCW 9A.46.020 states in part:

(1) A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury in the future to the person threatened or to any other person;. . .and (b) the person by words or conduct places the person threatened in reasonable fear that the threat will be carried
out. . .

RCW 9A.84.010 states in part:

(1) A person is guilty of the crime of riot if, acting with three or more persons, he knowingly and unlawfully uses or threatens to use force. . .

RCW 9A.76.180(3)(a) provides the definition of threat as used in RCW 9A.76.180 as, ". . . to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or threats as defined in RCW 9A.04.110"

RCW 9A.04.110(25) defines threats in part as:

To communicate, directly or indirectly, the intent: (a)

> To cause bodily injury in the future to the person threatened or any other person; or (b) To cause physical damage to the property of a person other than the actor; or . . . (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

Plaintiff argues that the record contains no evidence of a threat being made by plaintiff on the night in question and there was no threat made in an attempt to influence a public servant's actions or create a reasonable fear of violence. Plaintiff argues that plaintiff's statement could not be construed as amounting to riot nor can it be shown that plaintiff was acting in concert with three or more other persons.

Defendants argue that a reasonable officer in the position of the defendants would have believed that plaintiff's statement was a threat of force in violation of 9A.76.180, that the statement created a reasonable fear in the deputies of violence by a threat of violence, and that the statement was a threat in violation of 9A.84.010. Defendants argue that plaintiff's statement was more of a threat when combined

with the fact that plaintiff remained at the scene of the fire which was seen as an act of defiance.

Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990). "The fact that a threat is subtle does not make it less of a threat." *Id.*

"Whether a particular statement may properly be considered to be a threat is governed by an objective standard-whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *Id.*

In light most favorable to the nonmoving party, and considering plaintiff's statement in its entire factual context, there is a genuine issue of material fact regarding whether a reasonable person would foresee that plaintiff's statements would be interpreted by those whom the maker communi-

cated the statement as a serious expression of intent to harm. Therefore, there are genuine issues of material fact regarding whether plaintiff's statement was a threat towards the deputies and whether the defendants had probable cause to arrest plaintiff for violation of RCW 9A.76.180, RCW 9A.46.020 and RCW 9A.84.010. The court should deny plaintiff's motion in regards to this issue.

b. Protected Speech

Plaintiff also argues that his speech was protected by the First Amendment and therefore he cannot be arrested for these crimes.

Defendants argue that plaintiff's statement was not protected speech. Defendants argue that the court has previously held that there are genuine issues of material fact whether plaintiff's words were likely to succeed in fomenting an attack on a third party.

"The first amendment protects a significant amount of verbal criticism and challenge directed at police officers."

Duran v. City of Douglas, Arizona, 904 F.2d 1372, 1378 (9th Cir. 1990). However, "fighting words" are excluded from first amendment protection. *Seattle v. Camby*, 104 Wash. 2d 49, 52 (1985). The test used to determine whether speech contains fighting words includes three steps: 1) the words must be directed at a particular person or group of persons, 2) the words must be "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction, and 3) look at the words in the context or the situation in which they were made. *Id*, at 53.

Where the speaker is likely to succeed in fomenting an attack by or on a third party, regardless of actual success, his minatory words fall outside the first amendment. *United States v. Hoff*, 22 F.3d 222, 224 (9th Cir. 1994). Also, "A 'true' threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amend-

ment." *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990).

Considering the facts and circumstances in which the statement was made and the evidence of its content, there are genuine issues of material fact regarding whether plaintiff was likely to succeed in fomenting an attack on the deputies and whether plaintiff's statement to the deputies was a threat. Therefore there are genuine issues of material fact regarding whether plaintiff's speech was protected by the first amendment. The court should deny plaintiff's motion on that issue.

4. Failure to Disburse (RCW 9A.84.020)

There is also a material issue of fact regarding whether defendants had probable cause for arresting plaintiff based on RCW 9A.84.020. *See*, Part II. A, above.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658RJB
Plaintiff,	)	
	)	Tacoma,
v.	)	Washington
	)	
PAUL THRASH, TERRILL LARSON, and P. DONNELLY, individually,	)	
Defendants.	)	

TRANSCRIPT OF EXCEPTIONS TO INSTRUCTIONS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE, and a Jury

* * * * *

MS. FITZER: Good morning, Your Honor. Bertha Fitzer, for the plaintiff, taking exceptions to the jury instructions.

I would start with the court's jury instructions, and the first exception that we would take would be to the claims instruction as you have drafted it, Your Honor. It does not

include a claim for a specific First Amendment violation, and as we indicated in our trial brief and indiscussions previously with the court, we believe that both the first Amendment and the Fourth Amendment are implicated and that a violation of either would give rise to a cause of action.

THE COURT: The First Amendment is implicated, as is reflected in the jury instructions. It is my judgment that that is not a separate claim but is a matter of balancing, as is reflected in the jury instructions, the right to speak. It's like the question of yelling "fire" in a crowded theater, so to speak. I think the jury has to balance between that right to speak and the right to speak improperly as obstructing.

But anyway, go ahead.

* * * * *

MS. FITZER: For the record, we would object to the verdict form that does not reflect a First Amendment claim, also.

Thank you.

MR. HAMILTON: Did the court want us to also take exceptions to instructions not given?

THE COURT: Yes.

Do you have further exceptions to instructions not given?

MS. FITZER: No, Your Honor. I incorporated the ones that we do.

THE COURT: I would like you to comment on the right to resist instruction and on the damage instruction that she commented on, counsel.

MR. HAMILTON: First of all on the -- I will go to that first, then, Your Honor.

* * * * *

Also, our final third supplemental jury instruction dealing with the right to disburse [sic], at least an order to disburse [sic]. Plaintiff has had his expert testify that there was no right to order the crowd to disburse [sic]. He's argued that, in essence, to the jury already through his questions. The court, as I understood on Friday, disagreed with that, and yet

the seed is planted in the jury, the question of whether the officers even had a right to order a disbursal [sic]. Therefore, if plaintiff obstructed that order of disbursal [sic], that would be our ground for an arrest. But if he's allowed to argue to the jury that there was no right to order disbursal [sic], then we can't even get to our -- one of our grounds for arresting plaintiff. So we would object to the failure to give that instruction as well.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Hamilton.

Almost all of the theories that have been discussed this morning in this brief discussion are in these jury instructions. I have put them in in different ways, obviously, than counsel suggested, but a great deal of what you have urged here by way of exception is entirely arguable under the jury instructions.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658RJB
Plaintiff,	)	
	)	ORDER DENYING
v.	)	PLAINTIFF'S
	)	MOTION FOR NEW
PAUL THRASH, TERRILL	)	TRIAL/JNOV
LARSON, and P.	)	
DONNELLY,	)	
individually,	)	
	)	
Defendants.	)	

THIS MATTER comes before the court on plaintiff's Motion for New Trial or Judgment Notwithstanding the Verdict. The court has considered the records and files herein and the evidence adduced at trial, as well as the memoranda filed in support of and in opposition to the motion. The issues raised by plaintiff were fully discussed and considered at trial, and oral argument would not be of assistance to the court in resolving the motion.

The court is satisfied that under the totality of the

evidence presented, the instructions on the law were appropriate and that the decision of the jury was within the evidence and the law, and that the evidence considered by the jury was appropriate and within the rules of evidence. Accordingly, it is now

ORDERED that Plaintiff's Motion for New Trial/JNOV is **DENIED**.

The Clerk of the Court is instructed to send uncertified copies of the Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 3 day of May, 1996.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Case No.
	)	C94-5658(RJB)FDB
Plaintiff,	)	
	)	COURT'S
v.	)	INSTRUCTIONS TO
	)	THE JURY
PAUL THRASH,	)	
	)	
Defendant.	)	

DATED_____

_____
FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

INSTRUCTION NO. 10

On plaintiff's wrongful arrest claim, the plaintiff has the burden of proving each of the following propositions with respect to his claim of unlawful arrest:

1. The acts of Defendant Thrash were intentional;

2. Defendant Thrash acted under color of law;

3. The acts of Defendant Thrash deprived the plaintiff of rights protected by the Constitution of the United States by arresting the plaintiff without probable cause.

4. The acts of Defendant Thrash were a proximate cause of the plaintiff's injuries.

If you find from your consideration of all of the evidence that the plaintiff has proved each of these propositions, your verdict should be for the plaintiff on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant on this claim.

You must determine whether Defendant Thrash had probable cause to arrest the plaintiff for a crime.

A person commits the crime of obstructing a public

servant when he knowingly hinders, delays, or obstructs any public servant in the discharge of the public servant's official powers or duties.

A person commits the crime of failure to disperse when he or she congregates with a group of three or more persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property and he or she refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing the law.

INSTRUCTION NO. 15

The plaintiff claims the defendant arrested him in retaliation for exercising his First Amendment constitutional right to free speech.

The right to free speech is not absolute at all times and under all circumstances, and an illegal course of conduct is not protected because the conduct was in part carried out by language in contrast to direct action. Hence where a speaker is likely to succeed in inciting an attack by or on a third party or to incite an immediate breach of the peace, regardless of actual success, his words fall outside the First Amendment. Similarly, a true threat is also unprotected by the First Amendment.

INSTRUCTION NO. 16

The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly present a threat or fighting words which hinder, delay or obstruct any public servant in the discharge of the public servant's official powers or duties.

The First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is shown likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance or unrest.

INSTRUCTION NO. 17

An arrest made with probable cause to believe plaintiff had committed a crime does not violate the First Amendment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658RJB
Plaintiff,	)	
	)	Tacoma,
v.	)	Washington
	)	March 18 and 19,
PAUL THRASH, TERRILL	)	1996
LARSON, and P.	)	
DONNELLY,	)	
individually,	)	
	)	
Defendants.	)	

VOLUME I
TRANSCRIPT OF EXCERPTS FROM TRIAL
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE, and a Jury

* * * * *

PATRICK P. DONNELLY, ONE OF THE

DEFENDATS, SWORN OR AFFIRMED

* * * * *

Q. Well, tell us about your role in terms of what you did on the night of September 6th, 1992, when you got to the beach. What did you do after you got out of your vehicle?

A. Deputy Larson was walking back from the fire that was on the sand spit, and I joined him, and we started walking towards the middle fire when we heard Officer Thrash say, "Over here." And we went to the middle fire where we -- I heard, I believe it was, Deputy Larson say "leave" at three different times. No one left, and I didn't hear the portion of "J.D., you're under arrest." I just saw Deputy Thrash go behind a guy in white shorts and start to put the cuffs on him, and I heard people say, "That's not J.D.," so he was turned loose. And I heard Officer Thrash say, "J.D., come out," something to that effect. And people said, "J.D. isn't here." After that I heard Officer Thrash tell everybody, "The party's over," and I'm not sure the sequence. I believe he said, "I'm tired of this," with, as Mr. Hamilton put it, bathroom, and --

Q. An expletive?

A. Yes.

Q. Okay. Starting with S?

A. Yes.

Q. Okay.

A. And he starts to say that this is a waste of taxpayer's money, or something to that effect, and he gets cut off in mid sentence -- excuse me. I'm getting this out of context, out of order.

Q. Uh-huh.

A. He said, "The firemen came down to put a fire out and all they got was a bunch of" --

Q. Expletive.

A. Yes. And then he said, "This is a waste of government taxpayer's money," and he got cut off in med sentence by Mr. Gulliford saying that "Why don't you get the 'F' off the island. Why don't you hop on the ferry, hop on the ferry and go back."

* * * * *

Q. What things were you describing then that is not on the tape that you heard?

A. Before contact was made with that group, I heard

somebody, I assumed it was Deputy Thrash, say, "Leave the park" three times.

Q. And you put that in your report?

A. Yes.

Q. And you wrote that report, that was -- did you write a -- how long after this event did you write the report?

A. Approximately three-and-a-half hours.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658RJB
Plaintiff,	)	
	)	Tacoma,
v.	)	Washington
	)	March 20, 21,
PAUL THRASH, TERRILL	)	25, 26, and
LARSON, and P.	)	27, 1996
DONNELLY,	)	
individually,	)	
	)	
Defendants.	)	

VOLUME II
TRANSCRIPT OF EXCERPTS FROM TRIAL
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE, and a Jury

* * * * *

GARY PETERSON, PLAINTIFF'S WITNESS, SWORN

OR AFFIRMED

* * * * *

Q. Before the other deputies were called over to your group, Deputy Thrash came up and addressed your group, didn't he?

A. I don't recall him addressing the group, no.

Q. Why don't you look at page 79 of your deposition, line 3.

A. 79?

Q. Yes, line 3.

Question -- were you asked this question and did you give this answer:

"Do you remember a deputy, Deputy Thrash, coming and talking to you before he called over the other deputies and said, 'They are over here, Sam. They are over here'; do you remember something like that?

"Answer: I remember somebody saying something, but I'm not sure exactly what was said."

Did you give that answer to that question?

A. Yes, I did.

Q. Does that refresh your recollection? Do you remember today, or do you not have a recollection anymore?

A. Not the greatest recollection, no.

Q. Do you remember that, not the greatest recollection, but

do you remember it now at all?

A. They were going all directions, whether it was Deputy Thrash or who, I'm not sure.

Q. But you recall some deputy addressing the crowd before he called over the other deputies?

A. I believe so.

Q. Okay. And you didn't hear what that conversation was, apparently?

A. I certainly don't remember it, no.

Q. So if there was a conversation regarding disbursing [sic] and leaving, you wouldn't have heard it?

A. There was no disbursal [sic].

Q. I know there was no disbursal [sic], but as to whether there was a request to disburse [sic], you didn't hear the conversation, you --

A. They --

Q. Let me finish.

You don't know if there was that conversation or not, do

you?

A. I heard them say something, but there was nothing about disbursing [sic].

Q. Well, if you didn't hear what they said, you don't know if it was disbursing or not, do you?

Mr. Deutscher: Your Honor, he answered the question.

MR. HAMILTON: I can rephrase the question.

THE COURT: You are arguing with the witness.

Q. (By Mr. Hamilton) What do you recall about the conversation? I thought -- let me strike that.

Do you know what was said in that conversation?

A. I don't remember everything that was said, no.

Q. And you don't know whether there was anything about disbursing [sic] or not because you didn't hear it?

Mr. Deutscher: Asked and answered, Your Honor.

THE COURT: You may answer.

A. I would have known if he said disbursing [sic]. There was

no disbursal [sic], asking for disbursal [sic].

Q. So you did hear all the conversation?

A. No, I did not hear all the conversation.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658RJB
Plaintiff,	)	
	)	Tacoma,
v.	)	Washington
	)	April 1, 2, 3,
PAUL THRASH, TERRILL LARSON, and P. DONNELLY, individually,	)	and 4, 1996
Defendants.	)	

VOLUME IV
TRANSCRIPT OF EXCERPTS FROM TRIAL
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE, and a Jury

* * * * *

SHELLEY WIGGINS, DEFENDANTS' WITNESS,

SWORN OR AFFIRMED.

* * * * *

Q. (By Mr. Hamilton) Let me draw your attention to page 55, line 18.

A. Yes.

Q. "Do you recall that before he called the deputy over, he talked to you about, you know, this is an illegal fire, please disburse [sic]; do you remember that?

"Answer: I remember that, yes."

Do you remember being asked those questions and giving those answers at that time?

A. Yes, I do.

* * * * *

MARY SMITH, DEFENDANT'S WITNESS, SWORN OR AFFIRMED

* * * * *

Q. Did you at any time hear a statement of, "I'm tired of this crowd, people, disburse [sic]." Do you remember hearing anything like that?

A. Yes.

Q. When was that in relation to what you hear on the tape, "The party's over, people"? When was that said?

A. The disburse [sic]?

Q. Yes.

A. After he -- after he said the party was over.

Q. Okay.

A. I believe.

Q. As far as what you heard on the tape -- have you listened to the tape?

A. Not recently.

Q. Okay. Assuming on the tape there's a statement of "I'm tired of this. The party's over, people," do you recall -- let me back up for a minute.

Do you recall Mr. Peterson being contacted by the deputies?

A. Right.

Q. Prior to that contact, do you recall any of the deputies making a statement to the crowd?

A. To disburse [sic]?

Q. Yes.

A. Boy, I think he did.

Q. What word did you hear him say?

A. Disburse [sic].

Q. And after he says "disburse" [sic] to the crowd, is that -- when did the contact with Mr. Peterson happen?

A. I think after he said that they just kind of walked up and grabbed Gary right away.

* * * * *

JOHN J. MITCHELL, DEFENDANT'S WITNESS, SWORN OR AFFIRMED

* * * * *

Q. When they pulled up and came to a stop, can you tell us what you observed or heard?

A. Well, I saw them -- I saw all the vehicles pull into the parking lot, and at that point it was pretty dark right down there so I couldn't see very much but I could hear a lot. And the first thing I remember, and I remember it very vividly because it was so different from my experience three weeks before when the sheriff's deputies came out, was I heard a

deputy -- I found out later it was Deputy Thrash -- shout very loudly, words to the effect, "Go home, people. The party's over," very, very loudly.

Q. Where in time did this occur from the time the deputy pulled up?

A. I would say it was within seconds of getting out of the car. That was the first sound that I heard. Everything was very quiet when the police cars pulled up, and the first thing I heard was this, was this loud command from the deputy for everybody to break up.

Q. And what happened after that?

A. Well, nobody left. And, again, I couldn't see anything. I heard the deputy say several more times, "Go home. The party's over." And then everyone seemed -- the deputies seemed to converge over by the fire area where I couldn't see, so I couldn't see anything then, but I heard conversations, arguing, many voices speaking at the same time.

Q. Were you aware at any time -- strike that.

What, if anything, did you observe of a struggle with Mr. Gulliford?

A. I really couldn't see any of that. I could hear just mooted sounds, and there were many voices, but I could not see anything.

Q. Did you -- what, if anything, did you see of the arrest of Curt Bray?

A. That's different. I saw that. I heard Deputy -- I believe it was Deputy Thrash, or it could have been one of the others, order Curt Bray to leave, to go home, like he ordered everyone else to leave, but they weren't following his command. And he ordered Bray to leave. Bray was the one who had the videotape, video camera on his shoulder. And he was very visible to me because the camera had a light on it, so. He had a beacon attached so I could see him wherever he went. So I could see him back up across the parking lot, and I heard the deputy tell him to go home, and he didn't go home. He stayed right there

* * * * *

PAUL D. THRASH, ONE OF THE DEFENDANTS,

SWORN OR AFFIRMED

* * * * *

Q. Where in line was your car, as far as the cars pulling up?

A. I think I was probably fourth.

Q. Does that include the fire district vehicle?

A. Yes.

Q. You said you went -- which group did you go to first?

A. I went to the fire that was to the south. The southernmost fire on that part of the beach.

Q. On your way to that fire, did you have any communication with the fire in the middle where the incident you later learned actually occurred?

A. Yes, I did.

Q. What was that contact?

A. As soon as I exited my vehicle, I started telling people to leave, to disburse [sic].

Q. Do you recall what words you used?

A. "Leave. Leave, people. The party's over. Disburse [sic]. Go home." A few things like that.

Q. How long does it take you to have contact with this first fire and come back?

A. Seconds. Ten, fifteen seconds.

Q. What was the contact with this other fire? Can you describe that?

A. It was a family of two with their kids, and they just had a small fire with a grill over it, and I told them, "You've got to put the fire out because of the burn ban," and they said, "Oh, no problem." And I mentioned what we were there for. They said, "Well, that's the other party over there. Nobody's left. Go get them." I said, "Okay. Thanks."

Q. After they told you that, what did you do?

A. That's when I walked back quickly to where the firefighters were and called over Deputy Larson.

Q. Prior to calling over Deputy Larson, do you have any

contact again with that group?

A. Same thing. People on the periphery of the crowd come out asking what was going on, and as I walked past them quickly, I would say, "It's time to go home. Leave. Disburse [sic]. The party's over." Just a passing conversational tone as I'm walking back to the firefighters.

Q. At what time do you learn that there was someone there videotaping various things?

A. Oh, I knew immediately.

Q. How did you know?

A. I could see him.

Q. At what time did it appear that he was pointing his camera in your direction?

A. Well, he was kind of pointing the camera in all of our directions at one time or another. Initially I think it was not pointed at me, but the time I can think of that it was the most pointed at me was when I walked back and contacted the firefighters.

* * * * *

NO. 00-35005

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HERBERT GULLIFORD, Plaintiff/Appellant

v.

PAUL THRASH, Defendant/Appellee

Appeal from the
United States District Court
for the Western District
of Washington
No. C94-05658 (RJB) FDB

BRIEF OF APPELLEES

---

* * * * *

Because the prevailing defendant did not cross appeal that supposed ruling in the first trial, such is claimed to be "the law of the case" which somehow bound Judge Burgess at retrial.[7] Id. at 17.

---

[7] Plaintiff at retrial never objected to the "failure to disperse" instruction on the ground it should not be given, CR

301. Inst. # 10; CR 316 at 20-21, CR 317 at 7-8, and cannot now object to an instruction on one ground at trial and rely on a different ground on appeal. Coastal Distributing Co v. NGK Spark Plug Co., 779 F.2d 1033, 1039 (5th Cir. 1986); Siegfried v. Kansas City Star Co., 298 F.2d 1, 7 (8th Cir.), cert denied, 369 U.S. 819 (1962). Hence, the issue is not properly before this Court on appeal. See Benigni v. Hemet, 879 F.2d 473, 475-76 (9th Cir. 1988).

* * * * *

Third, even if the facts were different and Judge Bryan had ruled that plaintiff's failure to disperse and threat to incite the crowd to violence could not be considered, this Court has recognized "the law of the case rule does not bind a court as absolutely as res judicata, and should not be applied 'woodenly' when doing so would be inconsistent with 'considerations of substantial justice'...." Moore, 682 F.2d at 833-34. Hence, application of the "law of the case" doctrine is discretionary, United States v. Mills, 810 F.2d 907, 909 (9th Cir.), cert. denied, 484 U.S. 832, 108 S.Ct. 107, 98 L.Ed. 2d 67 (1987), and does not apply to decisions that are "erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 618 n. 8, 75 L.Ed.2d 318, 103

S.Ct. 1382 (1983); United States v. Pend Oreille County Public Utility Dist. No. 1, 135 F.3d 602, 608 (9th Cir. 1998); In Re Rainbow Magazine, Inc., 77 F.3d 278, 281 (9th Cir. 1996). Indeed, plaintiff himself conceded at retrial that a "trial court cannot grant the motion solely in reliance on the [previous] holdings" but "must examine whatever materials the defendant presents" and cannot rule in plaintiff's favor if that evidence "demonstrates [a] factual dispute." CR 230 at 8. Here there was more than sufficient evidence in the first trial, see e.g. CR 166 at 27-28, 138; CR 168 at 549; CR 169 at 620, 647-48, 677-78, 759-60; Ex. 12 at 4; Ex. 13 at 2; Ex. 14 at 2 -- as well as in the second, see citations to record infra at 23-26 -- to support a jury in finding the crime of failure to disperse separate from plaintiffs words as well as that his words were an unprotected "true threat" or "incite[ment of] an attack by or on a third party" and part of plaintiff's crime of obstructing an officer. See also CR 301, Inst. #'s 10, 15, 16.

Plaintiff's "wooden" application of the law of the case is founded on a decision that was never made, that if made would have been "erroneous" and "would work a manifest injustice."

* * * * *

b. Instruction Number 16 Was Not Misleading Or Prejudicial.

Plaintiff calls instruction number 16 -- that stated the First Amendment does not protect the use of a "threat or fighting words" (emphasis added) -- prejudicial because "un-accompanied by this court's holding that 'the court has ruled as a matter of law that Plaintiff's words were not fighting words,' again, gave the Defendant the opportunity to argue that 'hop on the ferry, hop on the ferry and go back' were fighting words which did hinder, delay or obstruct the public servant in the discharge of the public servant's official duties or powers.'" App. Br. at 19. However, "[w]hen an appellant alleges an error in the formulation of the jury instructions,

the instructions are considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate." Oglesby v. Southern Pac. Transp. Co., 6 F.3d 603, 606 (9th Cir. 1993). See also Jones v. United States, 527 U.S. 373, 144 L.Ed.2d 370, 119 S.Ct. 2090, 2103 (1999); Jenkins v. Union Pacific R. Co., 22 F.3d 206, 210 (9th Cir. 1994); Oviate v. Pearce, 954 F.2d 1470, 1481 (9th Cir. 1992). This is because "[j]urors consider the evidence and trial as a whole" and do not "dissect instructions as if the sentences were frogs." Pressley v. Haeger, 977 F.2d 295, 298 (7th Cir. 1992). Here plaintiff cannot dissect an isolated term from the rest of a trial in which no one ever claimed "fighting words" were used and where the jury was not mislead or plaintiff prejudiced.

"Each instruction must be considered in connection with others of the series referring to the same subject," and "[e]ven where a portion of the charge is erroneous, if the point is explained and corrected in other parts of the charge

so that the jury will not be misled, the jury's verdict should be affirmed." Clarksville-Montgomery County Sch. Sys. v. United States Gypsum Co., 925 F.2d 993, 1003-04 (6th Cir. 1991). Here no evidence was ever presented, no argument ever made and no instruction ever implied that plaintiff's words were grounds for arrest if they incited Deputy Thrash to violence and therefore were "fighting words." See Houston v. Hill, 482 U.S. 451, 463, 96 L.Ed.2d 398, 107 S.Ct. 2502 (1987) ("fighting words" have a "narrower application in cases involving words addressed to a police officer, because 'a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'"); Smith, 93 Wn. App. at 48-49("fighting words" tend "to cause acts of violence by the person to whom they are addressed"). Rather, defendant's evidence and argument asserted only that probable cause to arrest existed for plaintiff's conduct in failing to disperse and for his

obstructing of the deputies by using the threat the hostile crowd (i.e. a "third party") might attack the deputies. See CR 325 at 4-18 and infra at 23-26. Similarly, the instructions nowhere stated that plaintiff could be arrested if he incited the deputy to violence but only that the First Amendment did not protect Gulliford from arrest if his "conduct" gave probable cause for a "failure to disperse," CR 301, Inst. #'s 10, 15 & 17, or if his words constituted a "true threat" or were "likely to succeed in inciting an attack by or on a third party" so as to constitute "obstructing." Id., Inst. #s 10, 15 & 16. Indeed, instruction number 16 specifically advised the jury that "[t]he First Amendment protects verbal criticism, challenges, and profanity directed at police officers unless the speech is shown likely to produce a clear and present danger of substantive evil that rises far above public inconvenience, annoyance or unrest." Id., Inst. # 16 (emphasis added). See also Hill, 482 U.S. at 461 citing Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131

(1949)(words protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.")

Even assuming somehow it was error not to instruct that "fighting words" were absent here, such was not prejudicial and therefore not ground for reversal. See Jenkins, id.("an error in the jury instructions does not require reversal if it is more probable than not that the error was harmless.") This Court has recognized a "failure to give a proper instruction" does "not prejudice the [party]" where "the evidence would have supported a verdict for [the opponent] even with that instruction." See Benigni v. City of Hemet, 879 F.2d 473, 480 (9th Cir. 1988). See also Mockler v. Multomah County,140 F.3d 808 (9th Cir. 1998), quoting Caballero v. City of Concord, 956 F.2d 204, 207 (9th Cir. 1992)("error not harmless because 'nothing about th[e] verdict indicate[d] that the result would have been the same without the error.'") Here, the overwhelming evidence of plaintiff's failure to disperse -

- much less of obstructing by his threat and incitement of the crowd to violence -- "would have supported a verdict for [Deputy Thrash] even with that instruction" that "fighting words" were absent here.

Numerous witnesses at the scene testified they heard multiple orders to disperse before Deputy Thrash approached the video camera and his orders were finally recorded. CR 314 at 15-16; CR 315 at 4-6, 11, 25-26; CR 321 at 12-14, 23-24, 29-30, 37; CR 322 at 11-12; CR 324 at 11; Ex. 12 at 4; Ex. 14 at 2. Further, when Deputy Thrash later did come within range of the microphone and was recorded as announcing that the "party is over," the videographer himself testified he thought the deputy was telling them "[t]hat we should go home." CR 318 at 52-53. Indeed, even plaintiff at least admitted he heard the announcement that the party was over but claimed he did not leave in response to the deputy's direction because "I didn't have time." CR 319 at 13. However, plaintiff also admitted he did have time

to "respond to his direction" by then interrupting the deputy with the intent "to communicate to the deputies that they are the ones that should leave ...." CR 319 at 13-17 (emphasis added). See also CR 314 at 24. Hence there was substantial evidence to show, both before and after plaintiff "said a word," he was violating RCW 9A.84.020 by failing to disperse when so ordered. See Tatro v. Kervin, 41 F.3d 9, 18 (1st Cir. 1994)(where plaintiff was arrested when he said "I can't believe what is happening" after being ordered to leave a party, failure to disperse and not the chilling of free speech was the cause of his arrest); Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2nd Cir. 1992)(claim of retaliation for exercising free speech rejected where there was probable cause to believe crime had been committed).

Such testimony also supports the conclusion plaintiff's failure to disperse and communication that the deputies instead should leave indicated by his words and inaction that he sought to obstruct the officers in their lawful efforts to

disperse the crowd and arrest a felon and therefore also was violating RCW 9A.76.020. See CR 319 at 17; Hill, 482 U.S. at 462 n. 11 ("a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt[s] to engage the officer in conversation while the officer is directing traffic" or who "run[s] beside [an officer pursuing a felon] in a public street shouting at the officer."); United States v. Brice, 926 F.2d 925, 931 (9th Cir. 1991)(where citizen consistently refused to comply with official directions and instead asked "why," his arrest was upheld against First Amendment challenge because his conduct contained both speech and non-speech elements); State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421, rev. denied, 100 Wn. 2d 1014 (1983)(where scene was noisy and confused and a crowd angry, the First Amendment is not implicated by an arrest under RCW 9A.76.020 of a person who attempts to talk to officers about arrest of another party goer after being told to leave.)

Finally, the jury could find under the totality of the circumstances presented by the evidence that plaintiff had issued a "true threat" or an "incitement to riot" as part of his unlawful effort to obstruct the deputies in dispersing the crowd and arresting a felon. See e.g. Melugin, 38 F.3d at 1484(a "true threat" exists where it is made "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm," and such "is a question of fact for the jury, not a question of law for the court."); Hoff, 22 F.3d 222, 224 (9th Cir. 1994)(Where an officer was "outnumbered, exposed, isolated and confronted by a previously and increasingly uncooperative individual," that individual's refusal to leave a campsite and inducement of a dog tethered to a tree to growl at the officer was "[m]ore akin to the cocking of a trigger than to privileged speech" and like "the incitement of a mob to riot ..., thus fails to

reach the constitutional threshold.") Where the record is replete with testimony that officials had been threatened that very evening by members of this same crowd and that the situation was tense and there was concern for the deputies' safety from the crowd when plaintiff called out from the midst of that same crowd for the deputies instead to leave, CR 314 at 7-9, 20-26; CR 315 at 36; CR 318 at 52-53; CR 321 at 14; CR 322 at 4-5, 16, 46; CR 323 at 5, 16-17, 73-74; CR 324 at 16, where indeed plaintiff himself testified he intended by his words to communicate to Deputy Thrash that "if he was smart, he should leave," CR 319 at 19-20, the jury could properly determine whether plaintiff was obstructing the deputies either by threatening them or by inciting the crowd to breach the peace. See Melugin, 38 F.3d at 1484 (a "true threat ... is a question of fact for the jury, not a question of law for the court."); Orozco-Santillan, 903 F.2d at 1265 (a true threat "should be considered in light of their entire factual context, including surrounding events"); Roy,

416 F.2d at 878 (whether statement constitutes a threat "is to be considered by the trier of fact in light of all the circumstances."); Gilbert, 884 F.2d at 457 (the "fact that a threat is subtle does not make it less of a threat.")

As Judge Posner of the Seventh Circuit explained in a second appeal after an alleged instructional error at retrial:

> [W]e do not set aside a jury verdict on the ground of lack of clarity, or even outright error in some of the instructions, unless -- having due regard for the unrealism of assuming that isolated passages in a long set of instructions are likely to have made the difference, we are convinced that the instructions, taken as a whole, [citations omitted] are likely to have impaired substantially the jury's ability to understand the case. [citations omitted]. ... Since jurors are not required to explain their reasoning, since their deliberations are confidential, and since their lack of legal training and experience makes it difficult for a judge to think his way into their minds, the attempt by judges to evaluate the impact of specific instructions on a jury's verdict is speculative and quite likely to be mistaken. This is a reason to proceed cautiously when asked to set aside a jury's verdict, and order a new trial bound to consume substantial judicial resources, on the ground that the instructions contained erroneous or confusing passages. .... The instructions here were inelegant and somewhat ambiguous, but that is not a good enough reason

> to put the parties and the district court through the ordeal of another trial.

Needham v. White Laboratories, Inc., 847 F.2d 355, 358, 360 (7th Cir. 1988). So too here -- even assuming for the sake of argument there somehow was a "lack of clarity, or even outright error" -- there is simply no basis upon this record to believe the "isolated passage" identified by plaintiff was "likely to have made the difference" but instead the only fair conclusion is that "the evidence would have supported a verdict for [Deputy Thrash] even with that instruction." See Benigni, 879 F.2d at 480.[8]

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[8] Plaintiff also oddly asserts "the court's failure to use Plaintiff's Proposed Supplemental Jury Instruction Nos. 18 and 19 flies in the face of the holding of Gulliford v. Pierce County, supra, that Plaintiff's words were not fighting words as a matter of law, and as such is appealable as a matter of law." App. Br. at 15. However, plaintiff does not include the failure to give these instructions in his "Statement Of Issues For Review," id. at 1-2, and nowhere in his brief mentions them again -- much less explains how he claims the failure to give them was error. Plaintiff also fails to disclose that these proposed instructions were not filed until the last day of trial in violation of the District Court's order and the civil rules. See CR 178; CR 316 at 12-16; Fed.R.Civ.P. 51;

West. Dist. Civ.R. 51(c). Further, "it is not error to refuse to give a requested instruction that is only partly correct in its statement of the law." Wright & Miller, 2 Federal Practice and Procedure, § 482 (1982), and plaintiff's proposed instruction 18 erroneously states that only "fighting words" can be made a crime, CR 297; contra supra at 16-20, while his proposed instruction 19 incorrectly states that plaintiff's words "cannot be the basis for probable cause to arrest for obstructing a public servant." CR 297; contra supra at 23-26.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 29,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
PAUL D. THRASH
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. Without going into the basis for your understanding, would you tell us what your understanding was why you went to Heron Island that evening?

A. We were responding to a felony incident where the firemen who had gone to put out an illegal fire were threatened by one individual, not only to burn up the fire engine, but

the firemen that had accompanied it. And that we had a crowd of people that we had to deal with to accomplish that.

Q. Now you mentioned this District 13. Do you know how many square miles District 13 covered?

A. It's approximately 115 square miles.

Q. Is A-22 an accurate map of District 13?

A. The areas in pink are District 13, including the islands.

Q. Now, what importance is it for officers' safety to have ready available backup on any call?

A. It's extremely important.

Q. What backup did you have available if you went to Herron Island?

A. Pretty much who you took with you.

Q. And how many people could you take with you on September 6, 1992.

A. The most that we could garner that night was the one state trooper, Reserve Deputy Donnelly, Sam Larson and myself, and I believe there was one other state trooper that

was in route that we had not been made aware of at the time.

Q. What importance to officer safety is it on a call that you have good communications with the dispatcher?

A. Well, that's your lifeline. If you get into trouble and you are outnumbered and you need help or anything, if you need to call, or a bust if you need to call for other types of equipment, if you need to call a Swat Team out, you have to be able to relay that to the dispatchers. And at that time our radios were the only thing that we had.

Q. What was the quality of the police radio reception around Herron Island?

A. Bad. It was very difficult to get out on the portable radio. Sometimes you couldn't get out at all, and iffy even on the radios in the patrol cars.

Q. Who was watching District 13 when you went to Herron Island?

A. Nobody.

Q. If that was the case and you had these safety concerns,

why did you go to Herron Island?

A. Well, we couldn't ignore the fact that a crime had occurred involving a public servant. And on their request we had limited options as to what action we could take.

Q. What actions did you take, when you get this call, you assemble the troops, what did you do then?

A. Well, we knew from the information we had gathered that night that we were facing a potentially hostile crowd against us. They had already intimidated and backed down the fire fighters. So that reinforced that fear.

We knew that these were not juveniles. These were senior older people, and that lent a little bit mor fear aspect it to.

We had a felony crime with the felony intimidation of a public servant.

We knew by the firemen's statement that it was J.D., although I didn't know who J.D. was at the time.

All the people that were there at that time could have been coconspirators to that threat to intimidate, to burn up

the fire engine. Obviously we didn't think J.D. could do it by himself.

So we felt that that entire crowd was behind him and giving credence to his threat. And that's what was related to us by the people making the complaint.

We still had a dangerous fire by the fire department's standards. They were saying this was a fire they needed to put out during the burn ban when it was awful dry.

So that was still in there even though it was minimized in terms of what our intentions were to do.

The plan that was formulated after researching the law in coming up with intimidation of a public servant, was to go there, arrest J.D., anybody else that interfered or obstructed us, disperse the crowd as quickly as we could so as to avoid the confrontation or potential fight or riot, because the fear was there that this could get out of control fast. And then have the fire put out at the end.

* * * * *

Q. Now, what information did you obtain from the fire to the south?

A. I just walked up briefly until I could see it was a man and woman and a couple of kids, two or three kids, and told them they had to put the fire out. They said, "We just roasted some hot dogs" or something. I said, "Yeah, I know, but it's fire department rules."

They said, "Well, that's the fire you want over there, nobody's left yet." And I said, "Oh, okay. Really. Thanks." Then I turned and walked away.

Q. Now, prior to your going to the southern fire, had you had any communication with any other persons around the fire that you believe was the one in question?

A. As soon as I got out of my car -- I mean, there were people milling all over the parking lot. Most of them are congregated around the fire. There's a couple of people that were near my door. As soon as I got out, I said, "Party's over, disperse, go home, leave."

As I continued to walk amongst these people and down to the beach, I kept reiterating the same thing.

So I don't know how many times I said this word versus that word. I just kept repeating over and over again to each person I ran into, "Party's over, leave, go home, disperse."

Q. What was the group's reaction to those directions?

A. Mostly they either ignored me or wanted to argue with me.

Q. Now, when you went back, after you were told by the people at the first fire that that's the fire that you want and no one's left, what did you do?

A. That's when I walked back quickly in front of the vehicles and I called to the other deputy, and I think I said, "Sam over here."

Q. Did you have any contact, verbal contact with the group at that time prior to calling out for Sam?

A. Just as I said, that every person that came within ear shot of me, I just repeated, "Leave, go home, disperse."

Q. So you spoke to them from the time you left the car, going past them, and then as you went back past them again?

A. Correct. Just like I told the family with the hot dogs, "Put the fire out." It was a continuous trek, and then conversations with everybody I came in contact with.

Q. Do you remember timing this out, how long this took?

A. It was less then a minute, I believe.

* * * * *

Q. What action did you take?

A. Well, because I had the feeling at that time I was dealing with a bunch of drunken people, and being nice to them and asking them politely "Leave, go home, disperse," was not working, that's at that point in time that I raised my voice to make sure that they could hear me and there was no mistake.

I raised my tone and I said, "People, I'm tired of this shit."

Q. Why did you use that expression?

A. Because there's a certain shock value. People aren't

expecting to hear that from a police officer.

At that point in time I was hoping to pierce that drunken veil and let them know just how serious I was, that I wanted them to listen to me and go home.

Q. When you said, "The party's over," what was it that you were trying to tell them?

A. That I didn't want them there at that fire any more so we could put it out. I wanted them just to go home.

Q. What did the crowd do in response to your more forcefully telling the crowd to leave?

A. Well, nobody left and they just escalated their arguments that they weren't doing anything illegal, this was a private Island. We didn't have any authority there, they hadn't done anything wrong. And wanting basically just to stay and disobey our direct orders to leave.

Q. What was your -- what if any safety concerns did you have for yourself at this point in time, considering all the things that had happened, the orders and the failure to dis-

perse, and now your more forceful order and sill getting argument, what was your personal safety concerns at that time?

A. Well, obviously as time drew on and nobody was obeying us, my feeling was in fear that the attention was escalating to a point that they were pushing us to a confrontation.

Q. Was there -- after you used this profanity the first time and the crowd responded by arguing with you, what did you do then?

A. Well, there were a couple of more boisterous people than others that, you know, tried to argue the legality of the fire. And we weren't there for that. I just told them that I didn't want to hear that.

They had been arguing constantly saying there weren't doing anything wrong. I basically said, "No, I'm tired of this." Then when I went on to the next statement, I wanted to address the fact that "the fire department comes down here and all they get is a bunch of shit," and that's when I was

interrupted.

Q. What is the danger -- what was your perception of the danger of allowing this contact with the group to evolve into an argument between you and the group?

A. Well, taking in context that we are dealing with senior, I mean older people here that should know better, my mind-set was that if they continued to argue, the longer they could stop us from taking action, the more force it lent them against us to back us down, because they knew they had us outnumbered, and it was a very real concern.

There was a certain amount of fear starting to creep up in the back of my mind as to what we could do, other than just back off and go back and do nothing.

Q. When you heard -- what were the words that you -- Let me try this again. I think you mentioned that you were interrupted. Had you finished your statement before you stopped speaking?

A. No, I had not.

Q. What interrupted you?

A. A person speaking out from inside the crowd.

Q. We all know that was Mr. Gulliford?

A. Correct.

Q. What did you hear Mr. Gulliford say to get you to stop speaking?

A. My recollection at that time was "Get the fuck off the island. Hop on the ferry, hop on the ferry and go back."

Q. You've seen the videotape obviously?

A. Yes.

Q. Do you know why that first expression is not discernible?

A. I can only assume that the camera mike wasn't pointed directly at him, or there was somebody between the camera and him at the time.

Q. When he said that first part of the statement, were you speaking at the same time yourself?

A. Yes, I was.

Q. Now, how far was the camera from you, if you can recall,

at that time?

A. I have to base that opinion on what I see in the videotape, because he was behind me.

Q. Who was closer to the camera, you or Mr. Gulliford?

A. Oh, I was closer.

Q. When Mr. Gulliford called out, did you have any problem hearing his voice?

A. No, I did not.

Q. To whom did you believe he was addressing his comments?

A. He was talking to me.

Q. What did you believe he was telling you when he said, "Hop on the ferry and go back?"

A. Going back to what I believe at that time, I don't think it was so much what I believe he was telling me as it was that he was telling the crowd to resist us further.

Q. What concern did you have as to the affect of the statement on the crowd?

A. Well, left unchallenged, it's a matter of who's right and who's wrong. I mean, here an officer of the law is trying to order this crowd to disperse, and here a person in the crowd is encouraging the crowd not to, by his statement telling us to leave.

Q. What was the crowd's response to that calling out to you?

A. I didn't give them much of a chance to respond at all. I just went to get the person that made the statement.

Q. Why is that?

A. Well, at that point in time it was obvious to me that he was obstructing me, not only from completing my instructions to the crowd to leave, but he was in furtherance of that obstruction of the orders to disperse.

I had already ordered everybody to leave. Nobody had taken a step one direction or the other to leave the area.

I think by that time I was fairly clear, if not absolutely clear, that that was my intention, that I wanted everybody to leave.

Q. What did plaintiff's comment communicate to you was his response to your orders to leave?

A. That he wasn't going to leave and he would just as soon that we did.

Q. Now, at that time when he calls out, under this circumstance, through your mental process did you review what options you had at that point?

A. I fell back on the planning. Obviously when you are caught up in a situation like this, and it's very confusing, there's a lot of people taking at once, that's the reason you go into a situation like this with a plan so that you don't have to second-guess yourself. Because if you second-guess yourself in front of them, they are going to see that as weakness and they are going to take advantage of it and press their position, and say, "Well, you don't even know what the law is, do you?"

So, yes, I fell back on the planning, that's the reason I pulled out the law books on the way over.

Q. Did you believe at that time, when you approached Mr. Gulliford, that you had grounds to arrest him?

A. Well, predominantly, just for him. I would say first comes to mind is the failure to disperse. Even had he not said anything, my feeling at that time was that I could have arrested anybody in the crowd for failing to disperse, since I'd given them a lawful order to do so and nobody took one step to do it. It didn't matter if I gave them 5 seconds or 5 minutes, there was no indication that anybody was going to comply with that order.

The other thing would be the obstruction. At that point in time that he interrupted me, he was interrupting my giving instructions for dispersal for any of those people that may not have heard me prior to that.

Even not taking those things into consideration, there was still the idea that we didn't know if he had been there at the time the threats were made to the fire engine or not, but if he continued to stay there, and my feeling was J.D. was there,

there was still that lingering conspiracy to commit a felony, intimidation of the fire fighters, as well as attendance at the illegal fire.

Q. You mentioned earlier that when you heard the statement, your concern was the effect it would have on the crowd. Is there any crime in affecting a crowd by your words, that you knew of?

A. Oh, sure, inciting a riot.

Q. Did you feel threatened by Mr. Gulliford's comment?

A. I had heightened anticipation. I didn't see that this was going to be a good situation one way or the other, because they weren't going to obey us.

Q. Now, when you went toward Mr. Gulliford to arrest him for the crimes that you mentioned, what was your intent on how you were going to carry that out?

A. Well, because he was in the center of the crowd, I had to go get him, because he wasn't going to come out on his own.

I immediately -- as soon as he interrupted me -- shined

my flashlight on him.

Q. Let's stop there for a second. Coincidentally you have something in front of you there. What's that?

A. This is a streamlight SL20. It looks pretty much like the one I had that night.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 30,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
PAUL D. THRASH - CONTINUED
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. Now, I placed on your report, I had it up there for you. I just wanted to go over your report and your testimony so that I am clear on it.

It is my understanding that you testified yesterday, before I started with you when you were speaking with Mr. Hamilton, that you gave multiple orders to people to leave as you

got out of your police car and walked over towards the fire in question here; is that correct?

A. That's correct.

Q. And was it your testimony that you spoke in a conversational tone?

A. I talked in a normal voice. Not normal for today, but normal then. It was a full body voice.

Q. For the jury's benefit, you are suffering, I understand, from a cold?

A. Yes.

Q. Now, those orders or directions for people to leave, who were they directed at?

A. Everybody I came in contact with immediately around my patrol car.

Q. And what was your authority for that, what were they doing wrong?

A. Well, as I stated, we had already determined that everybody in close proximity to that bonfire we were going

to disperse, because in our minds we had come to the conclusion that there was a hostile crowd backing up a threat to a public servant. And therefore we had a couple of different violations of law above and beyond the simple bonfire that was an illegal burning.

So we wanted to disperse these people, since we already knew they were confrontational, and just be able to go after J.D.

Q. How did you know that those were the same people who were there earlier?

A. We based everything pretty much on the fire fighters' statements us to.

Q. Did the fire fighters identify everyone who'd been there earlier?

A. No.

Q. Then again, I will repeat my question: How did you know who had been there at the time of the threat and who hadn't?

A. We didn't.

Q. And you just decided to tell them to leave anyway?

A. Right, instead of arresting them, we were going to disperse them and arrest the one for sure violator of law that we knew was there.

Q. Well, tell me where the people were standing that you told to leave as you got out of your car?

A. When I pulled up in the center of the parking lot, I can recall at least two people that had to move back when I opened my door of my patrol vehicle.

I mean, they were all around and milling about. This was in close proximity to this fire. I mean, we are talking 20-plus people here.

Q. So the people in the parking lot were milling around the fire?

A. Well, the people -- I mean were walking around my patrol car and back to the fire and back to the patrol cars, and they had beers in their hand and pretty much looked like they were all one group. They all knew each other as far as I

could tell.

* * * * *

Q. Now, it was also your testimony, and correct me if I am wrong, that you gave an order to leave prior to attempting to arrest the person you thought was J.D.; is that correct?

A. I gave numerous orders. "Leave" was one of the words I used.

* * * * *

Q. So isn't it true that you targeted Mr. Gulliford because he had the nerve to talk back to you?

A. No.

Q. And again, it is your testimony that you gave an order to disperse to a crowd that contained an individual that you were attempting to arrest for a felony; isn't that correct?

A. I am sorry, could you state that again?

Q. Is it your testimony that you gave an order to disperse to a crowd that contained a known felon?

A. Yes.

Q. Did you expect your known felon to disperse?

A. I suspect that he was in the crowd some place, and if we dispersed most of them we could single him out as they started leaving.

Q. How did you know he wasn't going to be the one who ran away first.

A. I didn't. We were on a private island. If there had been no conflict or confrontation, hopefully once he was away from the rest of the crowd we could have had the fireman point him out and arrested him calmly without confrontation with 20 other people.

Q. Well, if you didn't know he was there, then he could have dispersed; correct? You didn't know he was there; right?

A. My understanding was he was there.

Q. But you said earlier you didn't know he was there that night?

A. I had no personal knowledge. I depended on the knowledge of the fire fighters and the people who knew him.

* * * * *

Q. Looking also at 819, starting at line 23. I'll just try to summarize up there, asking question about the effect of Mr. Gulliford's statement to you.

The question, on line 23: "Question: What did that indicate to you?

"Answer: It raised my fear that there was a confrontation coming and that he was going to stand his ground and he was hoping by verbally challenging us that he was going to get the rest of the crowd incited and the rest of the crowd to disobey also."

Was that the question and your answer?

A. Yes.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 23,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF CROSS-EXAMINATION OF
HERBERT GULLIFORD
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. Okay. Could you turn to page 323, line 13. Starting at line 13, were you asked this question and did you give this answer:

"Question: And when he called out, you were intending to communicate to the deputies that they are the ones that should leave, weren't you?

"Answer: Yes."

A. Yes.

Q. Is that your testimony?

A. Yes.

Q. That's your testimony today as well?

A. Yes.

Q. You, as you testified, you felt the deputy needed some help making a decision?

A. It sounded like he did.

* * * * *

Q. Line 6, you were asked this question, and did you give this answer:

"Question: What did you expect the deputy to do to respond to your direction since he was obviously out of control?

"Answer: Well, if he was smart, he would have left."

Is that your answer to that question?

A. That's what you asked. I didn't tell him that at the time.

Q. I am sorry, that's what you thought. I was asking your intent in what you wanted to do in your mind. You wanted to communicate that if he was smart, he should leave?

A. Yes.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 29,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
JOHN MITCHELL
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. Were you able to see them arrive on the North Beach proper?

A. Yes, they went right past my house, turned the corner and parked right, sort of in the middle of the parking area there.

Q. Can you describe for the jury what you saw happened from the time the patrol cars pulled to a stop, forward?

A. I didn't see very much because of the trees that obscured my view. But I saw the people, the deputies and the others who were in the cars, get out of their cars and walk towards the area of the fire, the people that were having a fire.

Q. Did you hear anything that was said by the deputies?

A. Yes.

Q. What did you hear?

A. I heard, almost as soon as this one deputy, who appeared to be the person in charge, almost as soon as he got out of his vehicle, I heard him say words to the effect, and very loudly shouting, "All right, people, the party's over, let's go home."

And he repeated it over and over again, very loudly.

Q. Were you able later to determine who that officer was?

A. I found out later -- I had not met him before -- but I was told that was Deputy Thrash.

Q. After you heard the deputy' comments, do you remember how many times that these comments were made?

A. Well, it would just be an estimate, but I would say it went on for a minute or two, because people were not dispersing after, when he said that. Nobody moved, so far as I could tell.

Q. After these statements were made, what other -- what else did you hear or see?

A. Well, as I said, I couldn't see very much. But what I heard was, I heard the group of the deputies and the firemen move towards the fire area, and there was the loud command from the deputy to disperse and go home, the party's over.

Then I just heard that die down somewhat, and they moved towards the fire pit. And there was just a lot of voices shouting at once, a lot of arguing between the people who were there at the fire and the deputy, I think it was primarily Deputy Thrash, just arguing back and forth.

And the people were not leaving.

Q. At the time that you heard these things, what if any concern did you have for the officer's safety?

MR. FELDMAN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. HAMILTON:

Q. What was the tone of the crowd's reaction to these orders, to your observation?

A. Well, it was quite amazing, I've never seen anything --

MR. FELDMAN: Objection, nonresponsive.

THE COURT: I am not sure I understand that question. Is it from your own personal knowledge and observation that you made?

MR. HAMILTON: Yes, Your Honor.

THE COURT: All right.

A. That's what I understand, and I didn't complete my answer yet.

THE COURT: Well, I don't know where you are headed with it. Counsel?

BY MR. HAMILTON:

Q. To your observation, what did you observe, what was the

tone of the crowd's reaction to the deputy's command, before you heard this argument? Did you hear any kind of response at all?

A. Well, the response I heard from the people there was they were arguing with the deputies, in a very hostile manner.

I said before they were disrespectfully mocking the deputies when they came over on the ferry. The level just went up significantly. They were arguing with them

Here there was a deputy telling them to go home and they were arguing, "No." "You don't have the right to be here. Why are you doing this?" They just refused to leave. So they were arguing.

* * * * *

BY MS. DEUTSCHER:

Q. Isn't it also true that there are approximately 200-foot trees in between you and the beach?

A. I don't know how tall they are. Standard trees you are referring to there --

Q. Correct.

A. -- that I testified about? They are pretty tall, but I don't know how tall they are.

Q. And they totally obscured your view of the fire; isn't that correct?

A. They mostly obscured my view, as I testified.

Q. Now, it is your testimony that you heard multiple orders by the police for these folks to leave; is that correct?

A. I heard multiple orders by who I understood later to be Deputy Thrash.

Q. But you couldn't see what was going on at the time those orders were made, could you?

A. Aside from seeing the deputies walk from their vehicles in the parking lot towards the fire, I couldn't see anything except for the light from the video camera and the flames from the fire.

Q. So you don't know if you heard those before or after Mr. Gulliford was arrested?

A. Heard?

Q. The orders to leave. You don't know if those orders to leave occurred before or after Mr. Gulliford was arrested, because you couldn't see him being arrested; isn't that true?

A. I couldn't see him being arrested. Are you suggesting he was arrested before the deputies got out of their vehicles?

Q. No, that's not what I am suggesting.

A. Then I don't understand what you are suggesting.

I heard Deputy Thrash, as I testified, shout, almost as soon as he got out of his car. I could see him get out of his car in the parking area, walk towards the fire. "Okay, people, go home, the party's over."

Q. You heard him say "Go home"? Are you sure?

A. Yes, I am fairly confident he said, "Go home, the party's over." Excuse me, but at that point I don't believe any arrest could have been made. He just got out of his car.

Q. And you are sure you heard him say, "Go home," you said?

A. I'm fairly confident he said "Go" -- if he didn't use those specific words, "Go home," and if the people at the beach spoke English, they certainly got the intent of what he was saying.

* * * * *

Q. At any point, from the time the police officers arrived until the time they left, how could you distinguish whose voice you were hearing when you couldn't tell -- you couldn't see them?

A. By the -- no one has ever asked me that question before, that's why I had to hesitate for so long.

Probably based on the content.

MS. DEUTSCHER: Your Honor, if he could just answer the question.

THE COURT: Without editorializing, maybe get straight to the answer.

THE WITNESS: Very well, Your Honor.

A. Based on the content of what I heard. When the Deputy

says, "Go home, the party's over," that's from the police. You know, "Leave, the party's over," that's from the police.

Arguing with the deputies, "No, we're not going to leave. Why are you here? You don't have a right to be here. We have a right to stay on our beach. Go back to where you came from," that's clearly not the deputies.

BY MS. DEUTSCHER:

Q. You can't identify any of those voices as any specific individual, though, can you?

A. That's correct, I cannot. I hadn't even met almost all those people down there.

Q. If I understand your testimony, you commented that you heard the police officer say, "The party's over;" is that correct?

A. Yes.

Q. Okay. Before you heard that, did you ever hear the word "Leave" come out of any officer's mouth?

A. I may have heard "Leave." Again, the words were -- the

essence of the words were, "Get out of here. Leave. Go away. Go home. The party's over."

* * * * *

REDIRECT EXAMINATION

BY MR. HAMILTON:

Q. When did you see the deputy that you later learned was Deputy Thrash, when did you see him for the first time on that evening?

A. What did I see him do?

Q. When did you see him for the first time that evening?

A. When he got out of his vehicle.

Q. When he got out of his vehicle, where, as far as chronology, did he first make the statement that you've testified that he made?

A. He shouted for the people at the fire to "Leave" and "Go home" immediately within seconds after getting out of his vehicle.

Q. And between the time he got out of his vehicle and made

these statements, to the time that you heard argument or commotion, how many times do you believe that you heard Deputy Thrash make those statements?

A. Well, as I testified earlier, he probably shouted for a minute or more. So is that 10 times, 20 times. Many times.

Appendix "P"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 29,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
PATRICK DONNELLY
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. How long have you served with the sheriff's department as a volunteer?

A. Twenty-two years.

Q. And what training are you given as a reserve deputy, just generally?

A. We went through an academy and then usually once a

month they have training of some sort.

Q. As a reserve deputy, are you paid by the County?

A. No.

Q. What do you do for a living?

A. I work at McNeil Island as a corrections officer.

Q. Now on September 6, 1992, did you have occasion to travel to Herron Island?

A. Yes, I did.

Q. Can you tell me what your understanding, without going into the reasons for that understanding, was as to why you were traveling to Herron Island that evening?

A. There was a fire on the beach -- correct, two fires on the beach and there was threats made to the fire department concerning one of the fires.

Q. What was your understanding, again without going into the detail of the basis for your understanding, as to who had made these threats?

A. An individual named J.D. Michalski.

Q. What was your understanding, again without going into the detail, as to what role anyone else might have had in those threats?

A. Just that they were there and backed him up.

Q. Who was that?

A. The partiers at the beach.

* * * * *

Q. What observations did you make as far as any statements that Deputy Thrash made, between the time that you first saw him, to the time he contacted a Mr. Peterson?

A. "Leave the park," three different times.

Q. That was something that was said by Deputy Thrash?

A. Yes.

Q. Do you recall his exact words?

A. No. I wrote it in my report.

Q. After this statement was made by Deputy Thrash, what if anything did the people at the large fire do?

A. They were arguing and saying that they really didn't want

to leave.

Q. Did anyone leave in response to these orders?

A. To my knowledge, no.

* * * * *

Q. What officer safety concerns did you have that this crowd apparently was not following orders to leave?

A. That they might turn on us.

Q. Did you hear Deputy Thrash use a profanity in addressing the crowd?

A. Yes.

Q. What was your understanding at the time that that profanity was meant for?

MR. FELDMAN: Objection, Your Honor, he couldn't have had any understanding.

THE COURT: Sustained. He can say what he said.

BY MR. HAMILTON:

Q. How many times did you hear Deputy Thrash use that profanity?

A. Twice.

Q. What was the crowd's response to this forceful statement by Deputy Thrash, other than what you described that you heard Mr. Gulliford say?

A. It seemed like they got agitated and a little bit louder.

* * * * *

BY MR. FELDMAN:

Q. What was your observation of why or what -- never mind what, what did Mr. Gulliford do in your observation to warrant him being arrested?

A. Obstruction.

Q. He obstructed. And he obstructed by his remarks and interrupting the deputy in the middle of his speech; is that right?

A. I wouldn't characterize it as that.

Q. What else did he do besides that?

A. He got the crowd worked up by saying that and took us away from what we were there to do in the first place.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 30,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
JOE BEARDEN
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. Did you go back to the mainland with the officers?

A. I did not go back to the mainland with the officers.

Q. What statements, if any, did you hear Officer Thrash make to the group?

A. At what point in time?

Q. Before -- after Mr. -- Mr. Petersen was arrested and

before Mr. Thrash, Officer Thrash, attempted to arrest Mr. Gulliford.

A. I recall the officers saying that the party's over and to disperse.

Q. Do you recall hearing those precise words?

A. No, not those precise words. Something along those lines, that it was time to go home.

Q. Did you hear the words, "The party's over"?

A. I cannot be certain about it. I'm just generalizing to you what I thought I remember hearing.

Q. How many times do you think you heard Officer Thrash say that before Mr. Gulliford was contacted by Officer Thrash?

A. Say those words that I generalized on?

Q. Yes.

A. I cannot recall how many times. It had to have been several, and because no one was responding.

* * * * *

Q. When plaintiff called out to the deputies, were you able to hear his voice from where you were?

A. Yes, I was.

Q. Where were you at that time?

A. I believe I was in the vicinity of the fire.

Q. To whom did you believe that statement was directed?

A. To the officers.

MR. HAMILTON: Go to page 80, starting at line 20.

BY MR. HAMILTON:

Q. What was your reaction -- what was the crowd's reaction to Deputy Thrash's statement, other than plaintiff's calling out?

A. That of one of nonresponse.

MR. HAMILTON: Page 81.

BY MR. HAMILTON:

Q. At any time did you have any concern for your safety or the deputies' safety from this crowd?

A. Yeah. At one point in time it seemed to escalate, and I

was worried for the officers and the firefighters.

Q. How would you describe the level of tension at the time that plaintiff called out to the deputies?

A. Very high tension.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 22,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
CURTIS BRAY
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. Now, you heard the deputy say, "The party's over, folks," or something like that?

A. Yes.

Q. And what do you think "The party's over" meant? What did it mean to you?

A. That we should go home.

Q. Nobody went home, though, did they?

A. Not that I was aware of.

Q. In fact, after that, the crowd not only didn't leave, but they started to argue with them, didn't they?

A. Yes.

Q. And the crowd was beginning to be rebellious?

A. Yes.

Q. And the deputy responded to this rebelliousness by turning up his volume?

A. Yes.

Q. Now, you testified that you remember what Mr. Gulliford said.

A. Yes.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 29,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

TRANSCRIPT OF TESTIMONY OF
TERRILL LARSON
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE,
and a Jury.

* * * * *

Q. On September 6, 1992, after you got the call, or you were informed that there was a need for sheriff's deputies on Herron Island, what was your understanding as to why you were going to Herron Island?

A. That there was a beach party at the south end of the island. The people were intoxicated, and they had backed the

fire department off from putting a fire out during a burn ban.

Q. What was your understanding as to whether there had been any threats made?

A. That's how they backed the fire department off, they'd threatened their lives.

* * * * *

Q. How far were you from Mr. Gulliford when you heard him say this?

A. I was across the fire and I believe maybe 20 feet, maybe more.

Q. Were you aware of where the video camera man was at the time when this happened?

A. I think he was to my left.

Q. So who would be closer to Mr. Gulliford when the comment was made, you or the cameraman?

A. Well, I would have been.

Q. Did you have any problem hearing plaintiff's voice?

A. No.

Q. To whom do you believe this comment was directed?

A. At law enforcement.

Q. When you heard that statement, what was your understanding of what was meant?

A. For us to leave.

Q. What if any officer concerns did you have when that comment was made under these circumstances?

MS. DEUTSCHER: Your Honor, asked and answered about three or four times.

THE COURT: You may answer.

A. Any time you are in a drunken crowd you are worry about somebody piping up and getting the rest of the crowd to follow and become more aggressive toward officers, and that was our major concern at that point.

BY MR. HAMILTON:

Q. What were your options at that point when plaintiff, in the midst of this crowd under these circumstances, the knowledge that you had of why you went over there, made

this statement, what were your options available to you?

A. We could have kept yelling and talking to the crowd. We could have arrested someone. We could have left.

Q. What did Deputy Thrash do in response to this call?

A. We went over and arrested Mr. Gulliford.

* * * * *

Q. You were also asked about the mind-set of the trooper. Did the trooper tell you that he was scared to death of the crowd?

A. He was scared of the crowd, yes.

Q. Now, the exhibit that is the blow up of your report, what is it entitled, what kind of report is it?

A. "Intimidating a public servant."

Q. This form of report, is it a general report or a supplemental report?

A. Mine is a supplemental report.

Q. What does supplemental report mean?

A. It means that someone else is writing the reasons for --

you've got a general report, which is the case that you are taking. For instance, if you do an arrest, the person who makes the arrest normally does the general report. Then the supplemental reports are done by the assisting officers.

I was one of the assisting officers. So I write a supplemental report to his general.

Q. As far as any previous orders to disperse, prior to being called over by Deputy Thrash, where was your attention directed?

A. I was at the other fire.

Q. So if Deputy Thrash made orders to disperse, where was your attention during that time?

A. I wouldn't have heard it. I was back turned towards him on the other side, the cars between us.

Q. Did you hear what is at least recorded on the tape of Deputy Thrash saying, "This party's over people?"

A. Yes.

Q. You said you heard Mr. Gulliford's response?

A. Yes.

Q. What did Mr. Gulliford's response indicate to you was his willingness to disperse?

A. That they weren't leaving at all.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	November 30,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE.

* * * * *

THE COURT: All right. No. 10 talks about on plaintiff's wrongful arrest claim, the elements of proof. Any problem with Instruction No. 10? Any objection to that?

MR. FELDMAN: Yes.

THE COURT: All right.

MR. FELDMAN: Your Honor, I believe that it is absolutely important, critical for the jury to understand that --

and I briefed this before, I have given the Court some briefing on this -- there has to be a reasonable time given to disperse. That's the second part.

The first part is that the order to disperse must be clear and understandable and communicated to the person that was arrested, that they had to disperse or else they would be arrested.

THE COURT: Well, you are arguing the case now. Just tell me what you think should be included in there.

MR. FELDMAN: There should be something in there that defines that the order must be clear and communicated to the person to who has been arrested. He has to have heard it, and he has to have had a reasonable time to obey it before he is arrested.

THE COURT: All right. Mr. Hamilton do you want to be heard on that?

MR. HAMILTON: Just that I disagree with that. I think the language of the elements are from the statute, from

the state pattern book.

The only issue I would have, Your Honor, is when it gets to the elements, I think in our jury instruction we proposed that the fourth element be causation. That there is no constitutional violation without causing some harm, and that would be the only objection I would have to Instruction No. 10.

MR. FELDMAN: Your Honor, I don't understand what counsel's objection is. He wants to put in something that there's no violation --

THE COURT: I think what he's saying, there should be some showing of some -- that he was injured by that.

MR. FELDMAN: No, I don't think that's the law.

THE COURT: That is what he is saying. I am not asking you what should be there.

What I am trying to get now, I don't want you to argue. You are telling me in this instruction there should be some-thing about a reasonable time to disperse after some order,

that it should have been clear and communicated, and it had been violated. You are saying that that should be a part of this.

That is what I will take as I revisit this and give you what I am going to give you tomorrow, and you are saying that that element should be in there.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT GULLIFORD,	)	Docket No.
	)	C94-5658
Plaintiff,	)	(RJB)FDB
	)	
v.	)	Tacoma,
	)	Washington
PAUL THRASH,	)	December 1,
individually,	)	1999
	)	
Defendant.	)	Court of Appeals
	)	No. 00-35005

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE.

* * * * *

MR. FELDMAN: As far as the other, I still also believe there should be some qualification to the disperse that has to be clearly communicated. I believe that common sense dictates that as well, but I think that there should be something.

THE COURT: You can argue that.

MR. FELDMAN: Yes.

THE COURT: I think if you want to argue that they

didn't give him enough time or did give him enough time.

* * * * *

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VI, clause. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the free dom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RCW 9A.76.020

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in > RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.

RCW 9A.84.020

(1) A person is guilty of failure to disperse if:

(a) He congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

(2) Failure to disperse is a misdemeanor.

Supreme Court, U.S.
FILED
OCT 11 2001
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No. 01-430

In The

Supreme Court of the United States

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Respondent, Herbert Gulliford, opposes the petition of Deputy Paul Thrash for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

REPORTS OF OPINIONS

The decision of the Ninth Circuit Court of Appeals which is the subject of Deputy Thrash's petition for writ of certiorari is an unpublished memorandum, *Gulliford v. Thrash*, 2001 WL 427285 (9th Cir. Apr. 25, 2001).[1] (Pet. App. C.)

This matter was previously before both the Ninth Circuit and this Court. The decision in that appeal was *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998), *cert. denied*, 525 U.S. 828 (1998). (Pet. App. A.) The Petitioner neglected to include a copy of this Court's order denying certiorari in that decision. A copy of the order is included in the Respondent's Appendix in this volume.

[1] The case title of *Gulliford v. Pierce County* was changed to *Gulliford v. Thrash* during its second trip to the Ninth Circuit Court of Appeals. For clarity, the 1998 opinion entitled *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998), *cert. denied*, 525 U.S. 828 (1998), will be referred to as *Gulliford I*. The 2001 memorandum entitled *Gulliford v. Thrash*, 2001 WL 427285 (9th Cir. Apr. 25, 2001), will be referred to as *Gulliford II*.

STATUTES INVOLVED

It should be noted that the text of the Revised Code of Washington § 9A.76.020 (hereinafter RCW 9A.76.020), as provided to this Court by the Petitioner, is incorrect. (Pet. App. "W" 2-3.) Petitioner cites the 1995 version of the statute which is substantially different from the 1975 version in place at the time of this incident in 1992:

> "**9A.76.020 Obstructing a public servant.** Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required by him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor. (1975 1st ex.s. c 260 § 9A.76.020)"[2]

STATEMENT OF THE CASE

I. FACTS

Petitioner Thrash has attempted to gloss over the facts of this case, and attempted to rewrite the facts by so doing. Thrash cites *United States v. Poocha*, 2001 WL

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[2] Sections 1 and 2 of the statute had been found to be unconstitutional by the Washington State Supreme Court in *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), ten years before Mr. Gulliford was arrested. Mr. Gulliford was arrested for violation of Section 3 of the 1975 version of the statute.

880840, at *3 (9th Cir. Aug. 7, 2001) to bolster his recitation of the facts, although none of the judges who heard *Poocha* heard either *Gulliford I* or *Gulliford II*. A more accurate rendition of the facts is found in *Gulliford I*, 136 F.3d 1345, 1347 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).

Because Petitioner's Questions 2 and 3, as posed to this Court, are based upon his misrepresentations of these facts, it is necessary to review what actually happened on Herron Island.

Deputy Thrash completely neglects to mention that the entire episode was recorded on videotape with sound recording.[3] (Ex. 10.) In reaching its decision, the Court of Appeals had access to Exhibit 10, and viewed it before hearing oral arguments in this appeal and in *Gulliford I*.

Petitioner continues to insist that Mr. Gulliford "failed to disperse". (Pet. 2-3, 5-6, 14, 20-24.)

Ex. 10 shows that the first order to disperse was issued after Mr. Gulliford was already on the ground, pulled down from behind by Deputy Thrash. Deputy Terrill Larson yelled, "Disperse, disperse, that's *once*, you've been warned." Mr. Gulliford was already under arrest at that time, face down in the beach sand with Deputy Thrash on top of him, kneeing him in the neck. (Ex. 10.)

Thrash further neglects to mention that Mr. Gulliford had no part in the events earlier on the day in question.

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[3] The videographer, Curt Bray, an island teenager and Eagle Scout, was also arrested for Obstructing A Public Servant that night, but was also never charged with a crime. (Exs. 10 and 12.)

There are no allegations in any of the evidence that Mr. Gulliford did anything other than to arrive at the community beach shortly before the deputies did.

The deputies were looking for a man named J.D. After arresting (and apparently un-arresting) a Mr. Petersen – the wrong person – Deputy Thrash angrily addressed the crowd, cursing at them and telling a woman who spoke to "Shut up, just shut up!" (Ex. 10.)

As Deputy Thrash lectured this group of mostly middle-aged people, and in response to Thrash's statement, "This is a waste of government . . . ," Gulliford responded in a conversational tone, "Then why don't you hop on the ferry, hop on the ferry and go back." (Ex. 10. *See also Gulliford I*, 136 F.3d 1345, 1347 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).)

In the words of Deputy Patrick Donnelly, "U 147 [Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." (Ex. 13.)

Each of the deputies agree that Mr. Gulliford never moved, opened his mouth to express his opinion in a single sentence, and was immediately arrested. (Exs. 10, 12, 13 and 14.)

An accurate summary of the pertinent parts of the police reports can be found in *Gulliford I*, 136 F.3d 1345, 1350 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998), at n. 7.

Ex. 10 shows a group of approximately fifteen people, some as old as 70, none of whom was armed, none of whom made a physical move toward the deputies, and none of whom was threatening the officers.

In actual fact, the most threatening behavior presented that night occurred when the officers were physically beating Mr. Gulliford, and this crowd of mostly middle-aged people shouted promises to call their respective lawyers in the morning. (Ex. 10.) Perhaps a frightening thought, but certainly not a crime.

J.D. was never arrested (that night or at a later date), neither Mr. Gulliford nor videographer Bray was ever charged with a crime, much less convicted of one, and even the beachfire which seemed to be of such concern was allowed to burn itself out the next day.

II. PROCEDURAL HISTORY

Plaintiff Gulliford originally brought an action in Pierce County (Washington) Superior Court. Following a voluntary non-suit, this action was filed in the United States District Court for the Western District of Washington at Tacoma. (CR 1.)

A jury trial was held, with the jury instructed that if Gulliford's words so much as *delayed* the officers, he was guilty of obstruction and there was probable cause for his arrest. (CR 146, Instruction 15, paragraph 5.)[4] The jury found for Defendant Thrash. (CR 148.) An appeal was taken to the Ninth Circuit Court of Appeals. (CR 158.)

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[4] The remaining paragraphs of this lengthy jury instruction were correct statements of the law and were expressly not appealed.

The verdict was overturned based upon the incorrect statement of law in the jury instruction. One judge dissented, although he agreed that the instruction at issue was incorrect. His dissent was based upon his belief that Gulliford had not adequately preserved his objection to the relevant instruction.

The dissenting judge did not reach the issue of qualified immunity. The majority ruled that Deputy Thrash had not adequately preserved his objection to the district court Judge's denial of his request for qualified immunity, although they stated that even if the proper procedures had been followed, it did not appear that the district court erred in denying qualified immunity to the officer. (Pet. App. A.)

Thrash's requests for rehearing and rehearing en banc were denied, and *not a single judge* of the circuit requested that a vote be taken as to whether to rehear the case en banc. (Pet. App. B.)

The case returned to the district court for a second trial presided over by a different judge. This judge used a slightly different jury instruction, but the instruction still did not reflect that Gulliford's words were not "fighting words" as a matter of law, as the Ninth Circuit had ruled. (CR 301, Instruction 16.) The judge also allowed instructions regarding "other crimes" Gulliford was now alleged to have committed. (CR 301, Instruction 10.) (After having listened to three weeks of testimony, the judge in the first trial had already ruled that the jury was not allowed to consider these so-called "other crimes".) The second jury also found for Deputy Thrash. (CR 302.)

Plaintiff Gulliford again appealed based upon the incorrect jury instruction, the reintroduction of allegations of "other crimes", and the judge's failure to direct a verdict on liability. (CR 307.)

In an unpublished memorandum,[5] two of the three judges ruled that the jury instruction was again a misstatement of the law, that the law of the case doctrine should have prevented the reintroduction of allegations of "other crimes" supposedly committed by Gulliford, and ruled that the district court judge should have directed a verdict on liability as no properly instructed jury could have found that Gulliford's words were a crime, and that the defendants could present no other viable basis to support a finding of probable cause to arrest the plaintiff. (Pet. App. C.)

The third judge agreed that the jury instruction was a misstatement of the law, but believed that the jury should have been able to consider "other crimes" which the defendant now alleged Gulliford had committed.

However, the dissenting judge waived his right to have the opinion published,[6] and while voting for rehearing by the original panel, he voted to reject Thrash's petition for rehearing en banc. *Not a single judge* of the circuit asked that a vote be taken as to whether to rehear the case en banc. (Pet. App. D.)

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[5] Petitioner Thrash did not make a request pursuant to Ninth Circuit Rule 36-4 to have this memorandum published.

[6] See Ninth Circuit Rule 36-2(g).

REASONS FOR DENYING WRIT

I.

THE CORRECT PROCEDURE FOR SEEKING REVIEW OF A DENIAL OF QUALIFIED IMMUNITY WAS NOT AT ISSUE IN THIS DECISION

A. Qualified Immunity Is Not Even Mentioned In This Unpublished Memorandum

In raising the issue of the correct procedure for claiming qualified immunity on appeal, it appears that Petitioner Thrash is referring to the published opinion in *Gulliford I*, not to the unpublished memorandum from *Gulliford II*. Qualified immunity was not an issue in the second trial of this matter, the phrase "qualified immunity" was never mentioned in Thrash's brief to the Ninth Circuit in *Gulliford II*, and it is not mentioned at all in the decision of the Ninth Circuit in *Gulliford II*.[7]

By again raising qualified immunity in his first and second questions posed to this Court, Petitioner has, in effect, asked this Court for a rehearing of its denial of his petition for writ of certiorari in *Gulliford I . . . more than one thousand days after this Court denied his petition*.[8]

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[7] The Petitioner originally asked the district court for a decision granting him qualified immunity on October 19, 1995 (CR 27.) This was denied by the district court on December 15, 1995. (CR 77.) The Ninth Circuit rejected Thrash's claim of qualified immunity in its opinion in *Gulliford I* on February 27, 1998. (Pet. App. A.) This court denied his petition for writ of certiorari on October 5, 1998. (Respondent's Appendix in this volume.)

[8] S.Ct. *Rule* 44.2 states, in pertinent part: "Any petition for the rehearing of an order denying a petition for writ of

B. This Court Acted Correctly When It Denied Certiorari In *Gulliford I* In 1998

Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. ___ (2001).

The first step in the analysis of qualified immunity claims is to determine whether the facts, as alleged by the non-moving party, would show that a constitutional right was violated. Gulliford alleged that he was arrested for nothing more than uttering one sentence of verbal criticism to the police, which violated his First Amendment right to free speech.

The second step in the analysis is to determine whether the constitutional right which has been identified is "clearly established". The right to verbally criticize

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certiorari . . . shall be filed within 25 days after the date of the order of denial . . . , but its grounds shall be limited to intervening circumstances of a substantial or controlling grounds not previously presented. The petition shall be presented together with certification of counsel . . . that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay[.]"

our public officials without thereby risking arrest has been clearly established since *at least* 1949. See *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896-97, 93 L.Ed. 1131 (1949); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-134, 94 S.Ct. 970, 971-973, 39 L.Ed.2d 214 (1974); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-463, 107 S.Ct. 2502, 2509-11, 96 L.Ed.2d 398 (1987); *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1994); *Mackinney v. Nielsen*, 69 F.3d 1002, 1006-07 (9th Cir. 1995).

Petitioner raises the procedural issue of when and how differing circuits require defendants to appeal from a denial of qualified immunity. He cites *Powell v. Schriver I*, 175 F.3d 107 (2nd Cir. 1999). In *Powell I*, the Second Circuit did not require an official to appeal from the denial of qualified immunity by the district court.

Powell I, which apparently has not been reviewed by this Court, was decided six months after certiorari was denied in *Gulliford I*.

In the procedures used by the Ninth Circuit, defendants who have been denied qualified immunity by the district court should immediately appeal the decision in order to prevent a trial from going forward. If the defendant waits until the completion of a trial of the matter, he should cross-appeal the district court's denial of qualified immunity if he expects to expand his rights on appeal and prohibit a second trial from taking place in the event the verdict would otherwise be reversed on separate grounds. *Gulliford I*, 136 F.3d 1345, 1351 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).

The Second Circuit procedures allow the defendant who has been denied qualified immunity by the district

court to use qualified immunity as a defense to liability on review without filing a cross-appeal. This not only flies in the face of the decision in *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (qualified immunity is an immunity from suit rather than a mere defense to liability), but it encourages parties to go through the costs and expenses of needless trials. If an officer truly could not have known that his behavior would violate a right, an action should not proceed to trial.

Yet even if this Court prefers the procedural requirements of the Second Circuit over those of the Ninth Circuit, the issue would be moot for two reasons. First, this Court has already reviewed the decision in *Gulliford I* and denied certiorari, and secondly, the right allegedly violated in this case was so clearly established decades before Gulliford was arrested for his speech that the procedural requirements of any circuit would be irrelevant to the final decision on qualified immunity.

II.

THE FEDERAL AND STATE COURT PRECEDENTS IN THIS MATTER ARE IDENTICAL

A. The Decision In *Gulliford I* Was Reviewed Three Years Ago

As discussed in Section I.A. of this brief in opposition, qualified immunity is not properly before this Court.

Furthermore, Petitioner's Question 2 in this petition is virtually identical to his Question 2 in *Gulliford I*, as to which this Court denied certiorari three years ago.

- Text of Question 2 in *Gulliford II* (2001):

  "In determining when First Amendment rights are 'clearly established' for qualified immunity purposes, should federal courts give full faith and credit to precedent of the officer's home state that upholds similar arrests against similar constitutional challenges?"

- Text of Question 2 in *Gulliford I* (1998):

  "Where a Circuit Court interprets certain police conduct as unconstitutional but a state court upholds it under the same federal provision, do police of that state violate 'clearly established' rights and lose their qualified immunity by relying on their state court's precedent?"

S.Ct. Rule 14.1(a) states, in pertinent part, that "The statement of any question presented is deemed to comprise every subsidiary question included therein." Petitioner has asked this Court to consider the same question twice, three years apart, and it pertains to an issue not even raised in the decision currently being reviewed.

B. Qualified Immunity Does Not Protect Officers From Behavior Which Is Clearly Established To Be Unconstitutional

Assuming *arguendo* that the Petitioner's procedural problems are overlooked by this Court, Petitioner poses an interesting question: whether Circuit Courts of

Appeals must give full faith and credit to decisions of state courts when those decisions interpret the same federal provision differently from the federal courts.

However, this question has no relation at all to the decision in *Gulliford I*.[9] The state court precedent, *State v. Lalonde*, 35 Wn.App. 54, 665 P.2d 421 (1983), is identical to the federal precedents, including *Mackinney v. Nielsen*, 69 F.3d 1002, 1006-07 (9th Cir. 1995); *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1994); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-463, 107 S.Ct. 2502, 2509-11, 96 L.Ed.2d 398 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-134, 94 S.Ct. 970, 971-973, 39 L.Ed.2d 214 (1974); *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896-97, 93 L.Ed. 1131 (1949); and so many others.

Contrary to Petitioner's representation, in *Lalonde* the officers had already been physically attacked twice by other party-goers. Lalonde persisted in physically approaching the officers, was repeatedly told to get back, was physically *pushed* back, and when he physically approached yet again, was arrested.

In upholding a guilty verdict against Mr. Lalonde for Obstructing a Public Servant, the Washington State Court of Appeals wrote in *State v. Lalonde*, 35 Wn.App. 54, 61, 665 P.2d 421 (1983): "Lalonde's offense did not arise from his speech, but from the acts which accompanied his words."

Even while refusing to examine the issue of qualified immunity because of Appellee's failure to cross-appeal,

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[9] The issue is not even mentioned in *Gulliford II*.

the Court of Appeals in *Gulliford I* noted that the right to verbally question the actions of police was "sufficiently clear" so that a reasonable officer could understand that he or she was violating the right. *Gulliford I*, 136 F.3d 1345, 1351 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998).

Pre-existing Washington State and federal law, dating back many decades, all concur that such speech is not a crime, and "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Texas v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 2510, 96 L.Ed.2d 398 (1987).

State v. Lalonde, 35 Wn.App. 54, 665 P.2d 421 (1983), which reinforced that speech alone was not a crime and was not criminalized by RCW 9A.76.020, was decided *nine years* before Mr. Gulliford was arrested.

The Ninth Circuit Court of Appeals ruling in *Gulliford I* directly complies with, and reinforces, the Washington State Court of Appeals' decision in *State v. Lalonde*, that only acts may be criminalized, not speech alone.

Petitioner cites dicta from a footnote to *City of Houston, Texas v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 2510, 96 L.Ed.2d 398 (1987) to support his case. (Pet. 13.) Yet even this footnote dicta supports Mr. Gulliford's position. He did not run alongside an officer chasing a fleeing felon, or persistently try to engage an officer in conversation who was attempting to direct traffic at a busy intersection. Mr. Gulliford never moved, verbally expressed his opinion in a single sentence, and was immediately arrested.

Deputy Thrash cites several cases, including *U.S. v. Brice*, 926 F.2d 925 (9th Cir. 1991), which have facts too dissimilar to the events in Gulliford to be useful.

The Petitioner claims that the Ninth Circuit failed to look at the context of the events in determining whether the right which was violated was "clearly established". He cites *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), and *Saucier v. Katz*, 533 U.S. ___ (2001). (Pet. 11-12.)

Although *Saucier v. Katz* is a Fourth Amendment ca rather than a First Amendment case, the principal that actions must be looked at in the context of events remains true. (*See also Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).) In the case at bar, this is exactly what occurred. The Ninth Circuit, in *Gulliford I*, 136 F.3d 1345, 1350 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998), stated that "[t]he facts before us are indistinguishable from those in *Hill* and its progeny.", citing *City of Houston, Texas v. Hill*, 482 U.S. 451, 465-67, 107 S.Ct. 2502, 2511-13, 96 L.Ed.2d 398 (1987). The court stated that even if Thrash had correctly appealed the denial of qualified immunity by the district court, "it does not appear that the district court erred in denying the officials qualified immunity." *Gulliford I*, 136 F.3d 1345, 1351 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998). The court went on to quote *Mackinney v. Nielsen*, 69 F.3d 1002, 1007 (1995):

> "Police officers have a difficult job, and they deserve the respect of their community. But they in turn must respect the right of individuals in that community to question their government and the role of the police. A reasonable officer

should have known that Mackinney was simply exercising that right."

Petitioner again attempts to convince this Court to decide a question which is not related to the facts or the law of this case, and which is not even raised in *Gulliford II* – the decision currently being reviewed. Mr. Gulliford did nothing but speak, and all of the precedents, state and federal, are completely consistent on this issue – speech alone, even when it is critical of police or their actions, is not a crime.

III.

WHEN PLAINTIFF DID NOTHING BUT SPEAK AND HIS SPEECH WAS PROTECTED BY THE FIRST AMENDMENT, THE NINTH CIRCUIT WAS CORRECT IN DIRECTING A VERDICT OF LIABILITY

A. The Petitioner Is Rearguing Facts Which Were Already Reviewed By This Court

Petitioner's Question 3 in this petition misstates the same facts as his Question 1 in *Gulliford I*, as to which this Court denied certiorari three years ago.

- Text of Question 3 in *Gulliford II* (2001):

  "May the Ninth Circuit, under the guise of the 'law of the case' and by preempting a jury's fact finding role, direct liability against a police officer because the arrestee accompanied his unlawful act with First Amendment speech?"

- Text of Question 1 in *Gulliford I* (1998):

  "Where a suspect verbally opposes police while at the same time he physically commits

> a crime, does the First Amendment overcome the Fourth Amendment to shield him from arrest?"

Petitioner Thrash continues to insist that Gulliford committed physical acts in addition to lawfully verbalizing his opinion. Yet the panel in *Gulliford I*, 136 F.3d 1345, 1350 (9th Cir.), *cert. denied*, 525 U.S. 828 (1998), stated that "that is all that Gulliford did – he spoke." The district court judge in *Gulliford I*, after hearing three weeks of testimony, precluded the jury from considering "other crimes" that the defendant was alleging Gulliford had committed. The videotape (Ex. 10) clearly shows that the first *lawful* order to disperse was issued after Gulliford was already under arrest.[10]

The Petitioner continues to misstate the facts of this case in order to manufacture a question which may be of interest to this Court. Even the state statute at issue in this matter was incorrectly quoted to this Court.

B. The Defendant Presented No Viable Basis For Probable Cause To Arrest Gulliford

At page 20 of his petition, Thrash states that "this decision . . . essentially holds probable cause to arrest for

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[10] Although not precedent in this case, in the prior state court proceeding in this matter, Pierce County (Washington) Superior Court Judge Karen Strombom denied Thrash's Motion for Partial Summary Judgment, stating, "I don't see that saying, 'This party is over,' is an order to disperse, and it seems to me you can't have people guess what an officer is telling them and then find probable cause for arrest if you're saying, 'The party is over.' "

obstructing an officer does not exist if accompanied by *First Amendment speech*[.]" To the contrary – the Ninth Circuit correctly found in both *Gulliford I* and *Gulliford II* that the Respondent's only "act" was his speech. His speech was protected by the First Amendment.

Thrash accuses the Ninth Circuit of an "outcome oriented abuse of appellate authority." (Pet. 22.) He claims that this is so because the appellate panel rejected his blanket assertion that applying the law of the case doctrine would create a manifest injustice. As the first lawful order to disperse was issued *after* Gulliford was already under arrest, ("Disperse, disperse, that's *once*, you've been warned." (Ex. 10)), the only "manifest injustice" which occurred was when the second trial judge ignored the rulings of the original trial judge.

The Petitioner appears to find significance in the fact that Gulliford did not object to the inclusion of a jury instruction in *Gulliford II* pertaining to Failure To Disperse. (Pet. 22, n. 3.) Prior to the second trial of this matter, Gulliford brought motions in limine and provided the district court with extensive briefing in an attempt to prevent discussion of "other crimes" which had previously been excluded from the case. The district court refused to follow the law of the case doctrine, and allowed testimony and discussion of these other alleged "crimes". At that point, and having fully preserved his objections to the district court's decision, Gulliford's only remedy was to try to present the jury with a correct and detailed instruction regarding Failure To Disperse. This request was also denied by the second trial judge.

At Pet. 23, Deputy Thrash actually claims, "[P]laintiff *meant* to obstruct officers in their lawful efforts[.]" (Emphasis added.) He then cites a plethora of transcript pages which are devoid of any evidence that Mr. Gulliford "meant to obstruct" the officers.[11]

In alleging that Gulliford's words were a "true threat", Petitioner cites *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990), and *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989).

In *Orozco-Santillan*, the defendant told the officer "take these handcuffs off and I'll kick your fucking ass",

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[11] Deputy Thrash includes in his Appendix 74 pages of snippets of testimony, a few questions and answers at a time, implying that these accurately represent the body of the testimony taken during three weeks of trial in *Gulliford I* and another week of trial in *Gulliford II*. Pursuant to *S.Ct. Rule 15.2*, Respondent Gulliford specifically states that these wisps of transcripts are misleading and obviously incomplete. The only remedy which Gulliford could use to respond to this unfair and misleading ploy would be to include the full transcripts of both trials, yet this would be in violation of *S.Ct. Rule 14.1(i)*. Suffice it to say that the Ninth Circuit was in possession of the complete record in formulating its decisions in both *Gulliford I* and *Gulliford II*.

The Petitioner also includes sixteen selected pages from his Ninth Circuit "Brief of Appellees" in *Gulliford II*. Many additional arguments and averments are contained in these pages which cannot be argued against within the page limits provided by this Court for briefs in opposition. (*See S.Ct. Rule 33.1(g)(ii)*.) In fact, adding the sixteen pages of additional briefing to the 27 pages contained in his petition for writ of certiorari, the Petitioner has managed to submit 43 pages of argument. Respondent Gulliford will merely issue a blanket statement that the extraneous briefing contains numerous misstatements of fact, law and the proceedings below.

and "you motherfucker, you will pay for this." *United States v. Orozco-Santillan*, 903 F.2d 1262, 1264 (9th Cir. 1990).

In *Gilbert*, the defendant drove an automobile at a black child, verbally threatened a white male who has a black step-brother, ordered his dog to attack a black child, and spat in the face of a mentally retarded black child. *United States v. Gilbert*, 813 F.2d 1523, 1525 (9th Cir. 1987).

Compare the facts of these cases with Mr. Gulliford's words in response to Deputy Thrash's statement, "I'm tired of this. This is a waste of government. . . . ". Gulliford stated, "Then why don't you hop on the ferry, hop on the ferry and go back." Petitioner's citations only serve to highlight the innocuous content and context of Gulliford's speech.

To fall outside of First Amendment protection, a statement must be a "true threat", meaning that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates as a serious expression of intent to harm or assault." *See Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990)). A threat has been defined as "an expression of an intention to inflict evil, injury, or damage on another." *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989).

Gulliford's words were not a threat as a matter of law, and the Ninth Circuit decision in *Gulliford II* correctly dispensed with Petitioner's grasping assertions that they were.

The Petitioner has attempted to change Gulliford's speech into physical acts, and his simple words into a threat. He then uses the resulting misstatements of fact and law to try to impugn the decisions of the Ninth Circuit. As the full panel of judges of that court have resoundingly stated – *twice* – by their refusal to even ask for a vote as to whether to rehear this matter en banc, Petitioner's attempts to change the unfortunate facts of this case have been unsuccessful.

CONCLUSION

Two of the Petitioner's questions regard qualified immunity, a subject which was not even mentioned in the decision in *Gulliford II*. The remaining question reargues facts which have been thoroughly reviewed by two Ninth Circuit panels and this Court.

These manufactured questions are not worthy of this Court's attention, and the Petitioner's bravado in attempting to trick this Court into rehearing a petition for writ of certiorari which it denied three years ago should be strongly repudiated by this Court.

Anyone old enough to have had the misfortune to break an old-fashioned glass thermometer will remember the frustration and futility of attempting to pick up the spilled mercury. It presented a moving and malleable target which defied all efforts to gain control over it.

So this case, with its ever-changing and reappearing defenses and allegations, has frustrated the efforts of the plaintiff, the district and circuit courts, and even this

Court which is now being asked to reexamine questions it has previously ruled upon. The decision of the Court of Appeals in *Gulliford II* should finally bring resolution to this matter by laying out firm guidelines for the district court to follow in reaching a just conclusion after almost seven years of federal litigation.

Respondent Gulliford respectfully requests that the petition for writ of certiorari be denied.

Dated: October 12, 2001

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
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WASHINGTON, D. C. 20543

October 5, 1998

Ms. Diana Lynn Kiesel
14706 Union Avenue, S.W.
Lakewood, WA 98498

RE: Paul Thrash
v. Herbert Gulliford
No. 97-2082

Dear Ms. Kiesel:

The court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

Supreme Court, U.S.
OCT 23

NO. 01-430

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

DEPUTY PAUL THRASH,

Petitioner/Appellee,

v.

HERBERT GULLIFORD,

Respondent/Appellant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. RESPONDENT'S STATEMENT OF CASE UNHELPFUL

In setting out his differing "statement of the case," respondent Gulliford not only fails to disclose what "difference" his version makes but also asks the Court to accept his mere characterizations of facts rather than provide any part of the actual record. See e.g. Br. In Opp., at 2-5, 17, 19. On the other hand, respondent dismisses Deputy Thrash's ample evidentiary support by arguing such are "snippets of testimony" and "wisps of transcripts" that in some unexplained way "are misleading and obviously incomplete." Id. at p. 19 n. 11. Respondent's exclusive reliance on characterizations rather than the record concedes that if the record is actually examined it can only be concluded -- as did two juries, two district court judges and the dissenting Ninth Circuit judge in the case below -- that "probable cause to arrest could properly have been found based on Gulliford's failure to disperse . . . ."[1] Gulliford v. Thrash,

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[1] Indeed, even the Ninth Circuit majority here never denied the presence of probable cause for failure to disperse, but simply ignored its presence by misapplying the "law of

2001 WL 427285 * 3 (9th Cir. Apr. 25, 2001)(Fisher, J., dissenting).

II. REASONS WHY CERTIORARI IS APPROPRIATE

A. Qualified Immunity Warrants Grant of Petition

Respondent does not dispute that the Ninth Circuit majority rejected petitioner's claim of qualified immunity on the ground he had waived it by failing to cross appeal his own successful defense verdict. Gulliford v. Pierce County, 136 F.3d 1345, 1351 (9th Cir. 1998). Respondent does not contest that in contrast this Court holds as an "inveterate and certain" rule, Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480, 48 L.Ed.2d 784, 96 S.Ct. 2158 (1976), that an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." Id. (quot-

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the case doctrine." See Pet. at 20-23; Gulliford v. Thrash, 2001 WL 427285 * 3 (9th Cir. Apr. 25, 2001).

ing United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L.Ed. 1087, 44 S.Ct. 560 (1924))(emphasis added). See also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 325 n. 3, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434, 84 L.Ed. 849, 60 S.Ct. 670 (1940).

Indeed, plaintiff expressly acknowledges that the Ninth Circuit majority's opinion in this case also is in conflict with decisions of other United States court of appeals on the same important matter. Br. In Opp., at 10-11. See also Powell v. Schriver, 175 F.3d 107, 113 (2nd Cir. 1999)(second circuit holds where "judgment entered was entirely in [the officer's] favor," an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."); Sims v. Mulchahy, 902 F.2d 524, 545 (7th

Cir.), cert. denied, 498 U.S. 897 (1990)(quoting Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987), cert. dismissed 485 U.S. 901 (1988))(seventh circuit holds it "improper and unnecessary" for prevailing officer to cross appeal his defense verdict because "[c]ross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary.") Rather, respondent argues the qualified immunity "issue is moot" because "this Court has already reviewed the decision in Gulliford I and denied certiorari, and secondly, the right allegedly violated in this case was . . . clearly established . . . ." Br. In Opp., at 11.

As to the denial of certiorari after the Ninth Circuit majority's first reversal, it is a well "settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits," Barber v. Tennessee, 513 U.S. 1184, 130 L.Ed.2d 1139, 115 S.Ct. 1177 (1995)(citing United States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 67 L.Ed. 361 (1923)), and as one authority has noted in criticizing Gulliford -- where quali-

fied immunity "was properly preserved at the first trial, . . ., it would remain open at the new trial." See 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3904 n. 14 (supp. 2001). Further, the denial of certiorari "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review," Ross v. Moffitt, 417 U.S. 600, 616-17 (1974), so that a lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. V. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). See also Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327, 328 (1967)(denying certiorari "because the Court of Appeals remanded the case [and thus it] is not ripe for review by this Court.") Here, the Ninth Circuit's first reversal "remand[ed] for a new trial on this claim" of unlawful arrest, see 136 F.3d at 1350, but now that same majority rules that a "directed verdict should have been granted" leaving no issue of liability to be decided. See 2001 WL 427285 * 3. Finally, as respondent

notes, the second circuit's conflicting decision in Powell v. Schriver "was decided six months after certiorari was denied," Br. In Opp., at 10, and this Court will deny certiorari but then grant it later when -- as here -- a conflict between circuits subsequently arises. See e.g. Skidmore v. Swift & Co., 320 U.S. 763 (1943)(cert. denied), 322 U.S. 723 (denial vacated and certiorari granted), 323 U.S. 134 (1944)(reversal of lower court decision.)

Second, as to the merits of qualified immunity here, respondent does not contest that the applicability of state precedent for qualified immunity has yet to be decided and petitioner well documents how the Ninth Circuit here ignored both federal precedent as well as the more pertinent precedent of the deputy's state court. See Pet., at 11-19. Respondent's discussion of petitioner's cited federal and state precedent (Br. In Opp., at 13-16) neither fairly distinguishes those cases[2] nor

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[2] For example, respondent argues that in State v. LaLonde, 35 Wn.App. 54, 665 P.2d 421 (1983) "officers had already been physically attacked twice by other party-goers"

justifies the Ninth Circuit's refusal even to consider them rather than inadequately "assert[] that a general right [defendant] was alleged to have violated . . . was clearly established." Compare Anderson v. Creighton, 483 U.S. 635, 640-41, 97 L. Ed.2d 523, 107 S.Ct. 3034 (1987) with 136 F.3d at 1351.

Hence, qualified immunity is not "moot" and a writ of certiorari is appropriate because the Ninth Circuit not only "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but

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and "LaLonde persisted in physically appraoaching the officers, was repeatedly told to get back, was physically pushed back, and when he physically approached again, was arrested." Br. In Opp., at 13. Here, too, the lives of officials and citizens repeatedly had been threatened by other party-goers, 136 F.3d at 1347; App. M at 1-2, 4-8; App. Q at 2-3; App. T at 1-2, the crowd of which Gulliford was a member repeatedly had been ordered to go home, 136 F.3d at 1347; App. I at 2-4; App. J at 2-3; App. K at 2-5, 7-9, App. M at 4-9; App. N at 1-2, 5; App. P at 2-3, 6-11; App. Q at 3-4; App. R at 1-2; App. S at 1, and Gulliford nevertheless persisted both in physically remaining and in verbally making clear to the officers his intent to remain despite their lawful orders. 136 F.3d at 1347; App. I at 3; App. M at 10-17; App. N at 7; App. O at 1-3; App. P at 3-5; App. Q at 4-5; App. R at 3-4; App. S at 2; App. T at 2, 5-6.

"has decided an important question in a way that conflicts with relevant decisions of this Court." See S.Ct. Rule 10(a) and (c).

B. Assumption of Jury Role Warrants Certiorari

Petitioner somehow asserts the question of the Ninth Circuit majority's preemption of the previous and any future jury by directing liability somehow was addressed by this Court and in any case was warranted. Br. In Opp., at 16-21. However, apart from the fact that this Court's previous denial of certiorari under different circumstances was not a ruling on the merits, see Carver, 260 U.S. at 490, the Ninth Circuit majority in its first reversal had not ordered a directed verdict nor addressed the "law of the case" doctrine and therefore those issues obviously were not previously capable of being raised to or decided by this Court.

Further, as to the Ninth Circuit majority's directing of a verdict on the ground there was no probable cause to arrest, respondent provides nothing to dispute such impropriety other than his characterization of evidence that he conveniently

chooses not to present to the Court. Indeed, respondent ignores that two juries, two district court judges and a member of the circuit court's own panel concluded from the entire record that under the evidence at trial "probable cause to arrest could properly have been found based on Gulliford's failure to disperse . . . ." 2001 WL 427285 * 3 (Fisher, J., dissenting). Nowhere does respondent address the basic issue that the Ninth Circuit in Gulliford, and thereafter in reliance on Gulliford, "has arrogated to itself the making of [the] finding" of the "quintessential factual inquiry" of whether words and expressive conduct under the circumstances are accompanied by illegal acts or are themselves true threats. See United States v. Poocha, 2001 WL 880848 * 7 (Aug. 7, 2001)(Tashima, J., dissenting).

Hence respondents have done nothing to dispute that the manner in which the Ninth Circuit majority directed liability against Deputy Thrash so far departs from the accepted and usual course of judicial proceedings -- and continues to be used

to justify similar departures in other cases -- as to call for an exercise of this Court's supervisory power. See S.Ct. Rule 10 (c).

III. CONCLUSION

Respondent accentuates the vacuity of his opposition by his unfortunate and baseless resort to accusing petitioner of "misstat[ing] the facts of this case in order to manufacture a question which may be of interest to this Court," and of "bravado in attempting to trick this Court into rehearing a petition for writ of certiorari which it denied three years ago." Br. In Opp., at 17 & 21. Any review of the law and record however not only quickly refutes such inappropriate and intemperate rhetoric, but justifies this Court in granting certiorari to remedy the Ninth Circuit's demonstrated errors concerning important federal questions and to avoid an improper appellate imposition of personal liability upon this police officer -- and other officers in the future -- whom two juries, two district court

judges and a circuit court judge have all found lawfully performed his duty.

DATED THIS 19th DAY OF OCTOBER, 2001.

GERALD A. HORNE
Prosecuting Attorney

By _____
DANIEL R. HAMILTON
Deputy Prosecuting Attorney
Attorneys for Deputy Paul Thrash